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Wisconsin Supreme Court

WISCONSIN REPORTS

110

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

APRIL 9—JUNE 20, 1901.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

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CASES DETERMINED

AT THE

January Term, 1901.

GLIDDEN, Appellant, vs. MEYER, Executor, Respondent.

February 4 — April 9, 1901.

Entire contracts: Preventing performance: Court and jury: Estates of decedents.

In an action to recover under a contract by which plaintiff agreed to act as housekeeper for defendant's testator during his life, hired help to be provided by him in case she was sick, in consideration of a certain sum per month and in addition $1,500 at his death unless she left her position before that time, there was evidence that plaintiff left the employ of deceased before his death; that she was sick and unable to do her work, though not confined to her bed, and that deceased did not provide help as he had agreed to do, and stated to others that she was only pretending to be sick, but no evidence that plaintiff asked for help and it was denied, or that it was impracticable for her to remain with the deceased and be treated for her illness. *Held*, insufficient to require submission to the jury of the question whether deceased wrongfully prevented plaintiff from performing the contract.

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This was a claim for services against the estate of one Solomon J. Griswold, deceased. Griswold died May 23, 1897, a resident of Lancaster, Wisconsin, leaving a will, which was thereafter duly probated. In 1896, the claimant, a half-sister of deceased, lived at Stockholm Center,

New York, with her husband, being then about fifty-five years of age. In the fall of that year, Griswold, the testator, visited at the claimant's house in New York, and talked with her about going to live in Wisconsin at his house in the capacity of housekeeper. After the return of the testator to Wisconsin, there was correspondence between the parties on the subject, which resulted in the claimant, with her husband and youngest son, a young man, coming to Lancaster, January 13, 1897. They went at once to the testator's house, and the claimant took charge of the household affairs as housekeeper, there being no other woman in the house. On the 30th of January following the following written agreement was made between the parties, under seal:

"This agreement, entered into this day by and between S. J. Griswold, of Lancaster, Grant county, Wisconsin, and *Lucinda Glidden*, late of Stockholm, St. Lawrence county, New York, witnesseth that, in consideration of services to be rendered by *Lucinda Glidden* to S. J. Griswold as his housekeeper, as hereafter set forth, namely, that *Lucinda Glidden* shall act in the capacity of general housekeeper for S. J. Griswold, where he may choose to live during the remainder of his lifetime, meaning that she should care for his house, and do the work in and about his house, and look out for his personal comforts, in the same manner as she would for her own, then S. J. Griswold agrees to pay to *Lucinda Glidden* for such services the sum of six (6) dollars per month from the 15th day of January, 1897, payable monthly, and board for herself and her husband, George Glidden, while he may live in the house of S. J. Griswold with her, and with a further understanding that, should *Lucinda Glidden* be sick and unable to do the work of the house, S. J. Griswold will provide hired help to do the work; and, as a further consideration, S. J. Griswold agrees that *Lucinda Glidden*, for a faithful performance of this agreement, shall receive at his death the sum of fifteen hundred dollars, which shall be in full for her services and properly chargeable to his estate; it being the distinct understanding that, should *Lucinda Glidden* leave the position she assumes in the house of S. J.

Griswold before the death of S. J. Griswold, then she is not to receive the last-named consideration of fifteen hundred dollars, said S. J. Griswold to be holden only for the monthly payment of six dollars and board for self (*Lucinda Glidden*) and her husband, George Glidden, while living at the house of S. J. Griswold."

Mr. Glidden returned to New York in March, 1897. The claimant continued to act as housekeeper for Griswold until May 11, 1897, when she returned to the east with her son, claiming to be so sick as to be unable to do the work required of her. She did not return to Wisconsin prior to the testator's death, which took place May 25th following. The claimant filed her claim against the estate of Griswold in the county court to recover $1,500, the sum named in the agreement, $50 for expenses for return trip to New York, and $24 alleged to be due as weekly wages from January 5th to May 11th. By her formal complaint filed in the county court, she alleged that she performed her contract with Griswold until she left in May, 1897, and that she was prevented and excused by the acts of the deceased, and his failure and refusal to comply with the terms of said agreement, from remaining with deceased to the time of his death; that, prior to the time of her leaving Griswold's house, her health had been failing, and was very bad; that she repeatedly asked the deceased to procure help for her as he had agreed, but that he refused to do so, and that by reason of said refusal, and the consequent burden imposed on her, her health became seriously impaired, and she became on the 11th of May, 1897, unable to do the work, and is still unable to do manual labor and constantly under the care of physicians; that Griswold refused and neglected to provide suitable food for claimant and her husband, and prohibited their having more than two meals per day, and treated her husband with great incivility and disrespect, making it unpleasant for the claimant and her husband to live in the same house with the testator; that the testator

compelled her to clear sidewalks of snow, carry wood into the house from outdoors, and carry all the water for household purposes from a neighboring well, all of which were services not called for in said agreement, and overtaxed her strength; that prior to the 15th of May, 1897, it was arranged between the testator and herself that they should both return to the state of New York to spend the summer, it being understood that they would both leave Lancaster on a certain day of May, and that on the morning of the day so fixed the claimant, relying upon the arrangements, purchased her ticket and boarded the cars, but that the testator, Griswold, after promising to meet her at the train, failed to go East, as he had agreed; that all of the said acts of Griswold were calculated and designed by him to get rid of the claimant and bar her rights to said sum of $1,500.

The defendant alleged, by way of defense, that the claimant abandoned said contract, and the answer also denied the allegations of the complaint that the testator prevented the claimant from performing her contract, or sought by artifice to induce the claimant to abandon the same, and denied all ill treatment and failure of the testator to perform his part of the contract.

The claimant recovered judgment for $1,500 in the county court, and the executor appealed to the circuit court. Upon the trial in the circuit court, the claimant's evidence tended to show that she was afflicted with a chronic disease prior to coming West, and was not strong; that, in addition to the cooking, washing, and other general household work at the testator's house, she did heavy work, such as carrying in wood, shoveling snow, and bringing water from an outdoor well, and that she was sick, though not confined to the bed, the latter part of February; that she improved in health after this sickness, and continued to do the labor required, and after her husband left in March she became sick again,

though still able to be about the house; that no help was at any time provided for her; that when she left, on May 11th, she was physically unable to do the work; that other persons calling at the house noticed that she appeared to be sick and unable to do the work, but that the testator said to several persons that she was putting it all on. There was no testimony to show that the testator consented to her leaving the house and going East, or that he agreed to go with her, but there was testimony to the effect that he knew she was talking of going. There was no testimony tending to show that the testator refused to provide suitable food, or that he treated the claimant's husband with incivility, nor was there any testimony that the claimant objected at any time to the shoveling of snow or the carrying of wood and water, or that she ever asked for any help in the house or medical treatment. There was no evidence to show that she could not receive proper medical treatment and care at the testator's house.

At the close of the evidence, the circuit court nonsuited the claimant as to the $1,500 claim, and rendered judgment for the claimant for the amount due her for monthly wages.

For the appellant there was a brief by *Clark & Taylor*, and oral argument by *S. H. Taylor*.

For the respondent there was a brief by *Lowry & Clementson*, and oral argument by *E. M. Lowry*.

WINSLOW, J. There were a number of exceptions taken to rulings upon evidence, which, however, are unnecessary to be considered, because, under the view we have taken of the case, they can in no way affect the result.

The action is one upon an entire contract of service, by which, in addition to monthly wages, the claimant was to receive $1,500 for acting as housekeeper until Mr. Griswold's death, but was to receive nothing but monthly wages in case she left the position in Mr. Griswold's house before his death.

That she left before Griswold's death is undisputed; so it is clear that she did not perform her contract, and hence cannot recover on the ground of full performance on her part. The only other ground upon which she can recover anything more than the monthly wages earned before her departure is upon the ground that the testator actually and wrongfully prevented her from performing the entire contract.

The whole subject of the remedies upon entire contracts for personal services has been so recently considered by this court that it is only necessary to refer to the case here, without restating the rules there laid down. *Hildebrand v. American F. A. Co.* 109 Wis. 171. Had the testator wrongfully discharged her or turned her from the house, this would have been a prevention by the testator of the fulfilment of the contract on her part; but he did not do so. The claim is, however, that his conduct amounted practically to compelling her to leave, and the question is whether there is evidence which should have gone to the jury substantiating this claim.

The only facts in evidence which can be said to tend in that direction are that the claimant was sick and unable to do her work, though not confined to her bed, and that the testator did not provide help as he had agreed to do, and that he stated to others that she was only pretending to be sick. Would a jury be entitled to find from these facts that she was compelled to leave? We think not. If there were evidence tending to show that she asked for help, and that it was denied, and that it was impracticable for her to stay at the house and be treated for her illness, we think there would be sufficient evidence of practical compulsion to go to the jury; but there is a total absence of testimony on those points. The claimant's illness was not such as to confine her to the bed, and not such as to make it necessarily palpable to an observer that she was unable to do the work. She apparently called no physician. No one, so far

as the evidence shows, informed the testator that she was unable to do the work. She seems to have performed the work required until her departure for the East. In this situation, the mere incredulity of the testator as to the serious character of her illness, and his omission to get help which was not asked, cannot, we think, afford any foundation for a verdict that he prevented her from fulfilling her contract.

We conclude that the nonsuit was properly granted.

By the Court.— Judgment affirmed.

IN RE MORGAN'S WILL.

March 19 — April 9, 1901.

Wills: Probate: Undue influence: Evidence.

Testatrix, eighty-four years of age when she executed the will in question, lived with her daughter, to whom she left the greater part of her estate, except small legacies to the contestants, children of a deceased son, and a considerable legacy to another son. She lived about four years after making the will, and before and thereafter attended to the greater part of her business. The will was properly executed at the home of a distant relative of the daughter's husband, neither she nor her husband being in the room at the time, though in the house; and after being signed, it was left on the table until taken by the son-in-law. Prior to its execution testatrix made declarations that the paper was her will, put in form by her son-in-law and then copied by her. She was then in good spirits, and took a lively interest in everything about her. with nothing to indicate she did not fully realize the importance of her action. There was evidence of her declarations that she intended her daughter to have the largest share of her estate, that she had promised her son not to make any will, and that by subsequent declarations she was fully conscious of having made the will. There was conflicting evidence as to her mental capacity. In a contest over the probate of such will findings that the will was not invalid because of the undue influence of the daughter are *held* not against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed.*

Proceedings to contest the probate of a will. The testatrix, Rebecca Morgan, was eighty-four years of age at the time she made her will, and was living with her daughter, *Charlotte M. Goodrich.* The evidence tended to show the following: Mrs. Morgan turned naturally and successfully to her daughter for a home and care in her old age. She had several grown-up grandchildren with whom she associated very little during the years immediately preceding the making of the will. She had a son, William, living near by. The will purported to finally dispose of her entire possessions, consisting of about $12,000 in value. She gave to the grandchildren and their mother $100 each. She divided the balance of her property into three parts, giving one third to her son William, and the residue to her daughter *Mrs. Goodrich.* The testatrix had strong affection for all of her children and grandchildren, but the daughter, *Charlotte*, was her main dependence for care in her old age, and she so regarded her situation at the time the will was made and for a considerable period preceding that event. She lived about four years after the will was made. She attended in whole or in part to her own business prior to the making of the will and thereafter. The will was executed at the house of W. H. Greenman, a distant relative of Ezra Goodrich, husband of *Charlotte M. Goodrich*, where the Goodriches and testatrix went by invitation. The home of the Greenman family was situated about three miles from that of the Goodrich family. The instrument was drafted by Ezra Goodrich and copied by Mrs. Morgan. It was taken by Mr. Goodrich to the place of execution. It was there produced and handed to Mrs. Morgan. Neither Mr. nor *Mrs. Goodrich* was in the room when the instrument was executed. Mrs. Morgan announced that the paper was her will and that it had been put in form for execution by Mr.

Goodrich and then copied by her. The only persons present at the time, besides the testatrix, were Mr. and Mrs. Greenman and Mrs. Greenman's mother. Mrs. Morgan placed the instrument on the table and signed it in a firm hand for a person of her age, though the writing does not indicate as much deliberation as her writing in the body of the instrument. There was no indication but that she fully realized the importance of her action. The witnesses signed the instrument at her request, each signing in the presence of the other and in the presence of the testatrix. The paper was then left on the table and was subsequently taken by Mr. Goodrich. Mr. Goodrich and his wife each made a will on the same occasion. In the will of the latter the grandchildren were provided for. Prior to the execution of the will the testatrix made some declarations to the effect that she intended the greater part of her property for *Mrs. Goodrich*, and at other times indicated that all her children would be treated alike. On the day the will was executed she was in good spirits and took a lively interest in everything about her, indicating clear mental conceptions of everything that came under her observation and would naturally interest a person circumstanced as she was if in a normal condition. She was in fair health for a person of her age. The son William did not want his mother to make a will. He importuned her not to do so, and she said she would not. Such occurrences took place after the will was in fact made. Nothwithstanding declarations of the testatrix as indicated, she made other declarations indicating full consciousness of the fact that she had made a will. There was considerable opinion evidence that the testatrix was not of sound and disposing mind when the will was made, based mostly on indications of momentary forgetfulness, inability to intelligently place value upon property, and childishness. There was opposing opinion evidence, and evidence of many facts indi-

cating mental soundness of the testatrix both before and after the will was made.

The cause was submitted to a jury for an advisory verdict, which resulted in findings of fact in favor of the validity of the will. The trial court adopted such findings and judgment was rendered accordingly.

For the appellants there were briefs by *John Cunningham* and *Smith & Pierce*, and oral argument by *Mr. Cunningham* and *Mr. William Smith.*

E. D. McGowan, attorney, and *M. G. Jeffris*, of counsel, for the respondent.

MARSHALL, J. An examination of the record satisfies us that the lower court was guided throughout the trial of this case by correct rules of law in weighing the evidence and deciding the issues of fact. There is no serious contention to the contrary, but it is insisted that the findings are against the clear preponderance of the evidence, especially on the issue of whether the chief beneficiary, *Charlotte M. Goodrich*, and her husband were so far instrumental in causing the will to be made that it was not the expression of the mind of the testatrix. It seems that we would not be justified in reviewing the evidence in detail in this opinion, by pointing out or quoting in substance those parts thereof that support the findings so as to demonstrate their correctness, and that they are sufficiently supported to at least preclude any disturbance thereof under the rules as to the status of such findings in this court. The principles to be kept in view in weighing evidence of the character produced in this case, and the probative force of particular circumstances which such evidence tends to establish, have been so many times considered that it is useless to attempt to add anything new that will be of value to the profession or the courts. So there is no call for us to say more than to announce the conclusion that has been arrived at, namely,

that the record does not show that the findings of fact are against the clear preponderance of the evidence, hence that the judgment must be affirmed.

By the Court.— So ordered.

A motion by appellants to modify judgment and mandate so as to direct that statutory costs of appellants and respondents be paid out of the estate was denied May 21, 1901.

MONROE WATER WORKS COMPANY, Appellant, vs. CITY OF MONROE, Respondent.

March 19 — April 9, 1901.

110	11
112	[1]359
110	11
114	[6]340
110	11
61 LRA	67n
61 LRA	71n
61 LRA	81n

Municipal corporations: Waterworks: Contracts: Exclusive franchise: Ultra vires: *Exemption from taxation: Ordinance: Definiteness: Waiver: Estoppel: Appeal from disallowance by council: Evidence: Custom.*

1. The fact that a contract between a city and a water company is *ultra vires* in so far as it grants an exclusive franchise is not available as a defense in an action by the water company to recover back taxes alleged to have been levied and collected in violation of said contract. [Whether in the absence of legislative grant a city has power to grant exclusive franchises, not determined.]
2. A provision in such contract that the city should pay for water for municipal purposes a sum, in addition to hydrant rentals, equal to the amount of all taxes levied on certain parts of the company's plant, expressly contemplates the payment of taxes, and is therefore not invalid as an exemption from taxation.
3. A provision in a contract between a city and a water company that the former should pay, in addition to hydrant rentals, a sum equal to the amount of all taxes assessed on such portions of the plant as were located on streets and public grounds, is *held* incapable of enforcement, since taxes must be assessed in a lump sum on all the property of such a company, including its franchises, and, by the terms of the contract, no satisfactory basis of apportionment is furnished.
4. Where for over six years a city paid a water company the semi-annual hydrant rentals due under its contract, and made no com-

plaint as to the character of the services rendered, although it had full knowledge of the imperfect character thereof, such conduct amounts to a waiver of a known right, and precludes the city from recovering damages based on such insufficient service.

5. Where the service to be performed is continuous, and its proper performance is a condition precedent to a right of action, and the act as performed is defective and imperfect, if the adverse party takes no objection to the manner of its performance, but pays the stipulated price, he cannot afterwards be permitted to reclaim the rights he has thereby waived.

6. Sec. 48, ch. 238, Laws of 1882, provides that when a claim has been disallowed by the common council of the city of Monroe and an appeal taken, such appeal shall be tried in the same manner as appeals from justices of the peace; and sec. 3768, Stats. 1898, provides that certain actions appealed from justices of the peace shall be tried in the appellate court as actions originally brought therein. *Held*, that when the conditions on an appeal from the action of the city council are such that a new trial in the circuit court is allowed, it is permissible to interpose a proper counterclaim.

7. Where a water company brought an action against a city, and the city set up a counterclaim for inadequate service at fires, the admission of evidence of inadequate service prior to the date from which recovery was sought, and also after the action was brought, cannot be justified on the ground that it showed habit, or custom, or course of conduct existing for a long time, it appearing from the city's bill of particulars that for a portion of those times no serious complaint was made.

APPEAL from a judgment of the circuit court for Green county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

In the year 1889 the common council of the city of *Monroe* granted a franchise to construct and operate a system of waterworks in said city to one W. H. Wheeler, granting an exclusive right for a period of twenty years. The ordinance granting the franchise prescribed at length and with particularity the kind of plant that should be erected, the kind, size, and number of miles of pipe that should be used, the manner in which it should be laid, the number of hydrants for fire protection, and how they were to be located, with many other conditions deemed necessary for its instal-

lation. The grantee agreed to keep the hydrants supplied with water for fire service day and night, and keep them in good order. The city agreed to pay for such fire protection $4,500 in semi-annual instalments on 1st days of February and August of each year. The city was also to have the free use of hydrants for flushing gutters and sewers, and free water for public schools and other city buildings, for certain drinking fountains, and for sprinkling purposes. In consideration for such service the city also agreed "to pay each year to said grantee, in addition to the hydrant rentals herein specified, a sum equal to the amount of state, county, and city taxes which may be levied upon such portions of said waterworks plant as is located on the streets and public grounds." Certain rates of charges were fixed for private consumers. Tests for a water supply were to be made and approved by the city, and before the works were accepted the plant was required to meet certain conditions prescribed. The ordinance contained other details of no importance in this litigation. The ordinance was accepted by Wheeler, and afterwards the plaintiff corporation was organized, which succeeded to his rights. The system was duly built, tested, and accepted. The pumping station was located on certain lots owned by the company. The standpipe was located in the city park, and the pipes, hydrants, and fountains were distributed in the streets and public grounds. From year to year down to the time of the commencement of this action, the city has paid the semi-annual instalments for hydrant rentals as they became due without protest. During the years 1890 to 1895, inclusive, the city levied taxes only on the real estate upon which the pumping station was located, the annual valuation being $4,000, except in the year 1894 the value was increased to $4,500, and in 1895 to $6,000. In 1898 the city assessed the entire system, including franchises, rights, privileges, real estate, pipes, hydrants, etc., at the gross sum of $30,000,

against which a tax was levied amounting to $642.08, which sum the water company was required to and did pay. Thereafter, basing its right upon that portion of the ordinance above quoted, the plaintiff presented a claim to the city council, claiming that its real estate was about one sixth of the whole value of the system of waterworks, and that the portion in the streets and public grounds was five sixths, and demanding that the city pay in the sum of $535.05, as being the proper portion of the taxes levied as aforesaid. The claim was disallowed, and an appeal was taken to the circuit court. That court directed an issue to be made by complaint and answer. The plaintiff filed a complaint, setting out the facts substantially as stated. The answer contained sundry admissions and denials, with allegations that the stipulations in the ordinance regarding the payment of a sum by the city equivalent to the taxes on that part of its plant on the streets and public grounds was tantamount to and was an agreement to exempt said property from taxation, and therefore void; that it was impossible to determine or apportion the values of the different portions of said plant, but, on the contrary, the plant was entire and inseparable and must be treated as an entirety for the purpose of taxation; that the attempt to grant an exclusive franchise was contrary to public policy and void. It then set up a counterclaim, claiming, among other things, that during the six years last past the plaintiff had neglected to provide modern appliances and to adopt proper means to secure direct fire pressure in cases of fires, and had so mismanaged its works and neglected to keep its hydrants in order that at a number of fires mentioned the fire pressure was wholly inadequate, and the said system afforded no protection to the property of the city, and in consequence thereof property of the citizens of the city had been destroyed of the value of $20,000, for which they had no remedy under the laws of this state; that the standpipe was of inadequate ca-

pacity and not properly equipped or kept in repair, direct pressure was not secured until after great delay, and generally the plant was carelessly and negligently handled. There being no other system in the city, rents had been paid although the value of the service rendered did not exceed $2,000 per year. Damages to the amount of $15,000 were demanded. A motion to strike out the counterclaim was denied. A reply was served, consisting of denials and an allegation of voluntary payment of rentals with full knowledge of the facts. A bill of particulars was filed by defendant, which set out in detail its grievances.

The jury rendered the following special verdict:

"(1) What is the relative value of that portion of the waterworks plant of the plaintiff located in the streets and public grounds of the defendant, as compared with the value of the whole of said waterworks plant? *A.* Eighty-three per cent.

"(2) Did the plaintiff, during the six years prior to February 7, 1900, furnish to the city of *Monroe* such a supply of water and such pressure as were reasonably adequate for the extinguishment of fires, if properly used by the city? *A.* No.

"(3) In case your answer to the last question is 'No,' you may state what the difference is between the value of the supply of water and pressure actually furnished to the city by the plaintiff, and that which should have been furnished on the basis of the contract price, in order to afford reasonably adequate protection from fire. *A.* $326.40 yearly for six years,—$1,958.40."

Plaintiff's motion for a new trial was denied, and defendant's motion for judgment was granted. Judgment was accordingly entered on defendant's counterclaim for $1,958.40 damages, besides costs, and the plaintiff's cause of action was dismissed. Plaintiff appeals.

For the appellant there were briefs by *Jackson & Jackson* and *P. J. Clawson*, and oral argument by *A. A. Jackson* and *M. G. Jeffris*.

For the respondent there was a brief by *Collin W. Wright*

and *Jones & Stevens*, and oral argument by *B. W. Jones*. To the point that by the overwhelming weight of authority municipalities have no implied power to grant exclusive privileges to corporations of the character of waterworks companies, they cited *Greenville W. W. Co. v. Greenville*, 7 So. Rep. 409; *Illinois T. & S. Bank v. Arkansas City W. Co.* 67 Fed. Rep. 196, 200; *Davenport v. Kleinschmidt*, 8 Mont. 467; *Brenham v. Brenham W. Co.* 67 Tex. 542; *Long v. Duluth*, 49 Minn. 280; *Smith v. Westerly*, 19 R. I. 437; *Gas Co. v. Parkersburg*, 30 W. Va. 435; *State ex rel Att'y Gen. v. Cincinnati G. L. & C. Co.* 18 Ohio St. 262, 291; *Richmond C. G. L. Co. v. Middleton*, 59 N. Y. 228; *Appeal of Meadville F. G. L. Co.* 4 Atl. Rep. 733; *Saginaw G. L. Co. v. Saginaw*, 28 Fed. Rep. 529, 535; *New Orleans C. R. Co. v. Crescent C. R. Co.* 12 Fed. Rep. 308; *Jackson C. H. R. Co. v. Interstate R. T. Co.* 24 Fed. Rep. 306, 310; *Davis v. New York*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *Montjoy v. Pillow*, 64 Miss. 705; *Minturn v. Larue*, 23 How. 435; *Flynn v. Little Falls E. & W. Co.* 74 Minn. 180; *Goose R. Bank v. Willow Lake S. Tp.* 1 N. Dak. 26; *Smith v. Newburgh*, 77 N. Y. 130, 136; *McBrian v. Grand Rapids*, 56 Mich. 95; *Parr v. Greenbush*, 72 N. Y. 463, 472; *Litchfield v. Ballou*, 114 U. S. 190, 192; *Thomas v. Richmond*, 12 Wall. 349; Dillon, Mun. Corp. (4th ed.), § 459 *et seq.; Niles W. W. Co. v. Niles*, 59 Mich. 311.

BARDEEN, J. As regards the plaintiff's right of recovery, the record furnishes no information as to the grounds upon which it was denied. The argument by the defendant in this court is that the ordinance is void (1) because it purports to create an exclusive franchise for twenty years; (2) because it is in effect an agreement to exempt plaintiff's property from taxation; (3) because that part of it sued on is so indefinite and uncertain as to furnish no basis for a recovery.

1. The ordinance in question gives the plaintiff an exclu-

sive right to erect, maintain, and operate a system of waterworks in the defendant city for a period of twenty years. We may concede, without so deciding, that as a rule the legislature alone has the power to make exclusive grants of this character, and that this power does not exist in the city unless expressly granted to it by its charter or some law of the state. Our attention has not been called to any such grant of power, and we may assume that it does not exist. The city had authority from the legislature to grant a franchise to a person or corporation to furnish it and its inhabitants with water. If it had no right to make the grant exclusive, it was at most *ultra vires*. The plaintiff has accepted the grant. It has constructed an expensive system of waterworks. For over eight years the city has been the recipient of substantial benefits thereunder, and from year to year has paid its rental dues. The exclusiveness of the right to use the streets was granted for the sole benefit of the water company. If it does not receive this benefit, the city loses nothing. Quoting from the opinion of Judge SANBORN in a similar case (*Illinois T. & S. Bank v. Arkansas City*, 76 Fed. Rep. 271):

"The grant of this exclusive right was neither immoral nor illegal. It was merely *ultra vires*. We know of no rule of law or morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond his powers. On the other hand, the true rule is, and ought to be, the converse of that proposition. It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void,"—citing *Oregon S. N. Co. v. Winsor*, 20 Wall. 64; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362; *Western Union Tel. Co. v. B. & S. W. R. Co.* 11 Fed. Rep. 1; *Saginaw G. L. Co. v. Saginaw*, 28 Fed. Rep. 529.

The supreme court of Iowa carry the rule so far as to say that the validity of an ordinance giving the exclusive privilege for a term of years of laying water pipes in the streets, etc., can be contested only by some other company or individual afterwards claiming such right. *Grant v. Davenport*, 36 Iowa, 396. Whatever the true rule may be, the discussion of the point at issue in the case in 76 Fed. Rep. 271, meets every argument urged here, and most clearly demonstrates that the city is in no position to avail itself of the objection urged.

2. Does the ordinance amount to an agreement to exempt the plaintiff's property from taxation? An agreement for immunity from taxation will not be recognized, unless couched in terms too plain to be mistaken. *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569. Where, however, the agreement is express, and the intention evident, to exempt property and release it from tax burdens, it is void and will not be enforced. *Little Falls E. & W. Co. v. Little Falls*, 74 Minn. 197; *State v. H. & St. J. R. Co.* 75 Mo. 208. Many other cases might be added, but the rule is so generally recognized that further citation is not necessary. The rule is equally well established that it is competent for a city and a company to agree that, as the price of services to be rendered, the city will pay a sum equal to the amount of municipal taxes to be levied. *Ludington W. S. Co. v. Ludington*, 119 Mich. 480; *Cartersville I. G. & W. Co. v. Cartersville*, 89 Ga. 683; *Grant v. Davenport*, 36 Iowa, 397. Of course, it must appear that the sum so stipulated to be paid is a fair and just allowance to compensate for the actual value of the services to be rendered, and that the stipulation is *bona fide*, and not in the nature of an evasion of the law against exemption from taxes. The stipulation in this case is not subject to this objection. The water company agrees to furnish water for flushing gutters and sewers; also for school and public buildings, drinking and display foun-

tains, and for sprinkling streets in the business portion of the city. In consideration thereof, the city is to pay annually a sum equal to certain taxes to be levied. There is nothing in this arrangement that we can perceive suggesting any exemption from assessment or taxation. On the contrary, it expressly contemplates the levy of a tax, and provides merely that, in addition to hydrant rents, the city shall pay a varying sum for the other services mentioned. If the agreement is sufficiently definite to be enforced, no reason is apparent why the city should not live up to its agreement.

3. Is the part of the ordinance sued upon sufficiently definite that it may be enforced? The clause in question reads as follows:

"The city agrees to pay each year to said grantee, in addition to the hydrant rentals herein stipulated, a sum equal to the amount of state, county, and city taxes which may be levied upon such portion of said waterworks plant as is located on the streets and public grounds."

Up to the year 1898 taxes were levied only upon the real estate and pumping station, at a valuation varying from $4,000 to $6,000. That year the assessor assessed all the franchises, rights and privileges, real estate, machinery, standpipe, water mains, hydrants, fountains, and all other property of the company as an entirety, at a lump sum of $30,000. This was done, presumably, in pursuance of the law as established by this court in the cases of *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 554; *Fond du Lac W. Co. v. Fond du Lac*, 82 Wis. 322; and *State ex rel. Milwaukee St. R. Co. v. Anderson*, 90 Wis. 550, which was later confirmed by distinct legislative enactment. Sec. 1037*a*, Stats. 1898. These cases recognized the fact that franchises are property, and possess a value capable of being estimated, and are liable to taxation in the place where the corporation does business, and may be assessed for that purpose as a part of the aggregate

corporate property. That was done in this case, and no contest is made as to the practical plan adopted. The fact that such franchises and privileges are of substantial value, and were included in the aggregate valuation of plaintiff's property, does not seem to have been appreciated or considered on the trial of this case. Testimony was offered as to the relative value of that portion of the waterworks plant located in the streets and public grounds, as compared with the value of the whole plant, regardless of the value of plaintiff's franchises, and the jury found such relative value to be eighty-three per cent. It is upon this foundation that plaintiff insists upon a right of recovery. Obviously this contention cannot be sustained. Such a basis of division would be false and unjust. The original agreement was evidently based upon the theory that the company's property was divisible — separable — for the purposes of taxation. Under the present rule of assessment, no taxes are or can be separately levied on that portion of the plant situated in the streets. We have no right to say, or permit the plaintiff to say, that the intention was to require the city to pay according to the relative value of the different portions of the plant, independent of the franchise interest. The difficulty of arriving at any satisfactory basis of apportionment according to the terms of the ordinance, in view of the rule of assessment, seems insuperable. It arises from the difficulty of separating the property of the corporation from its franchises. This difficulty is noted and commented upon in *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, and *State ex rel. Milwaukee St. R. Co. v. Anderson, supra.* To adopt the rule contended for would be to make for the parties a scheme they did not make for themselves. As at present advised, we see no basis furnished by the ordinance authorizing its enforcement as to the part in question. See *Detroit Citizens' St. R. Co. v. Common Council of Detroit* (Mich.), 85 N. W. Rep. 96.

We now come to the question of the defendant's counterclaim. It is based entirely upon the alleged failure of the company to furnish adequate fire pressure in times of fires during the six years immediately preceding the commencement of this action. The jury found that the difference in value between the supply furnished and that which should have been furnished was $326.40 for each year. The plaintiff urgently insists that under the circumstances in proof no recovery can or should be permitted on behalf of the city. This is based upon the admitted facts, among other things, that the plant was constructed according to the requirements of the ordinance and was accepted by the city, and that services had been continuously rendered and regularly paid for without objection or protest. The obligation of the company was to furnish the city with water, accompanied with the service and use of its plant in a particular way. Its duty required it to keep its plant in reasonably good repair, to use reasonable diligence in keeping its appliances and agencies in readiness for emergency use, and to furnish such fire pressure as might reasonably be expected from the character of the plant, size of pipes, and the like. The only complaint made against the company was that, in case of a few fires, instanced by the witnesses, there was some delay in securing fire pressure, and at times, in their opinion, the pressure was not sufficiently strong, or, as found by the jury, not "reasonably adequate for the extinguishment of fires." In other words, the ground of complaint arose from failure to render service in the way pointed out in the ordinance. The alleged delinquency arose, not from that portion of the service here sought to be enforced, but from past services which had been accepted and paid for in semi-annual instalments. The right of the city to recover is not based upon any loss or damage to city property, nor is it alleged or proven that it has suffered any direct pecuniary injury. Its claim is based entirely upon the alleged

inadequacy of the service rendered. It is shown conclusively that the city knew of such imperfect service at the time so rendered, and also when called upon to pay the bills presented. It never gave official notice or made any claim that such services were not performed in accordance with the ordinance. Regularly each six months it paid the amount stipulated without protest, and as in full settlement of six months' service theretofore rendered. It knew that the company claimed full performance. The character of the service was such that, if notice had been given of the specific ground of complaint, it could easily have been remedied. The company was bound to reasonably diligent service. Notice that the city claimed lack of diligence would undoubtedly have spurred the company to greater promptness. If the pressure was not deemed adequate, a suggestion to that effect would have commanded immediate response. The machinery, appliances, and agencies in use by the company had been tested and accepted by the city. If the city claimed that other or better means should have been employed, ordinary good faith demanded that such claim should have been made known to the company. From year to year during the period mentioned the company performed its service under the belief it had complied with its obligations, and each recurring six months the city paid in full therefor without protest and with full knowledge of the situation. If it be admitted, as is held in some of the cases elsewhere, that the city had a substantial claim for damages which it might enforce, still we do not see how it is now in a position to do so in this case. The facts show as clear and distinct a case of waiver as could well be imagined. "A waiver is the intentional relinquishment of a known right." 28 Am. & Eng. Ency. of Law, 526. It may be proved by various species of evidence,— by declarations, by acts, or by forbearance to act. *Fishback v. G. W. Van Dusen & Co.* 33 Minn. 111. The notice or intention of an act, in most cases,

is a matter of inference, to be deduced with more or less certainty from the external and visible acts and conduct of the party. It is to be ascertained and interpreted in the light of the accompanying circumstances of the particular transaction. *Traynor v. Johnson*, 1 Head, 51. It may be conceded that the furnishing of water in accordance with the conditions and requirements of the ordinance was a condition precedent to the right of the company to demand payment therefor. Where the service to be performed is continuous, and its proper performance is a condition precedent to a right of action, and the act as performed is defective and imperfect, if the adverse party takes no objection to the manner of its performance, but pays the stipulated price, he cannot afterwards be permitted to reclaim or rejuvenate the rights thus waived. Especially ought this to be true in a case for continuous service to be satisfied by periodical payments, where notice of the claim of defective performance would probably lead to a correction of the alleged defects in the future. This rule rests upon the ground that the party by his silence has misled his adversary, and, not having spoken when he ought, shall not be permitted to speak when he would. See *Johnson v. Oppenheim*, 55 N. Y. 280. The cases where the doctrine of waiver has been invoked are numerous and varied. In *Prussing V. Co. v. Meyer*, 26 Ill. App. 564, a master credited his servant with full time and settled with him on that basis, giving a promissory note. Suit being brought on the note, the master sought to set off time lost by the servant. This right was denied on the ground, among others, that defendant had waived performance. This case is cited and approved by this court in *Dickinson v. Norwegian P. Co.* 101 Wis. 157, where a counterclaim was sought to be enforced for time lost, after there had been a statement of account and a settlement between the parties. The counterclaim was disallowed. Another case somewhat more remote in its application is

Raipe v. Gorrell, 105 Wis. 636. A counterclaim for loss of time was denied enforcement, and the principle that, if one has paid money to another without mistake or fraud, he cannot reclaim it, was invoked and applied. Cases sustaining this rule are numerous, many of which are cited in the brief of plaintiff. The following in this state are in point: *Van Buren v. Downing*, 41 Wis. 122; *Noyes v. State*, 46 Wis. 250; *Custin v. Viroqua*, 67 Wis. 314. See *Locke v. Williamson*, 40 Wis. 377. Defendant's counterclaim in effect seeks to reclaim such parts of the sum it has paid for water service as it believes it was worth less than the stipulated price. It may be called damages or any other name of like import, yet the result is the same. It is nothing more nor less than a reclamation of a portion of the stipulated price, paid voluntarily, with full knowledge of the facts and under such circumstances as to lead the plaintiff to believe the transaction to be a settlement of its claims. Upon either of the grounds stated we are convinced that the defendant is now precluded from urging an affirmative demand against the plaintiff upon the alleged cause of action set up in the answer. In reaching this conclusion we have purposely omitted to consider whether the relations between the water company and city are such that the latter may or may not, on its own behalf, institute and maintain active proceedings based upon such relations. We have proceeded upon the assumption that, if it could, still it had shown no right to recovery. Our discussion is not to be considered either as an admission or denial of the right.

There are other minor questions urged against defendant's recovery. One is that a counterclaim is not permissible in cases appealed from city councils. Sec. 48, ch. 238, Laws of 1882 (defendant's charter), provides that, when a claim has been disallowed and an appeal taken, "such appeal shall be entered, tried, and determined in the same manner as appeals from justice of the peace," etc. Sec. 3768,

Stats. 1898, provides that certain actions shall be tried in the appellate court as actions originally brought there. No good reason is perceived why a proper counterclaim may not be interposed in cases appealed from city councils, when the conditions are such that a new trial in the appellate court is permissible.

Another ground of complaint is that evidence was admitted of inadequate fire pressure at fires occurring more than six years prior to the date from which recovery was sought, and also after the controversy had gotten into court. We have grave doubts of the admissibility of this evidence. The real issue was the manner and kind of service furnished during the period for which a recovery was claimed. Imperfect service or want of due diligence at other times would not necessarily sustain the cause of action sought to be enforced, and might be distinctly prejudicial to the other side. It cannot be justified on the ground of showing a habit or custom or course of conduct existing for a long time, because, according to the bill of particulars, there was a period from 1891 to 1895 that no serious complaint was made.

The other objections urged are not of sufficient importance to require attention.

By the Court.— The judgment is reversed, and the cause is remanded for a new trial.

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HUTSON and others, Respondents, vs. JENSON and another, imp., Appellants.

March 20 — April 9, 1901.

Guardian and ward: Mutual benefit societies: Certificate: Designation of beneficiary: Change: By-laws: Evidence: "Family": Wills: "Estates": Residuary bequest: Accounting: Sureties: Support of wards: "Investments."

1. Where a widow, who was designated in a certificate of membership in a mutual benefit society as trustee for certain children of her husband, was appointed guardian of such children, and subsequently received the proceeds as trustee, the ownership thereof by her wards being clear and unambiguous, she is liable as guardian from the time the money was paid to her.
2. Where in an application for insurance in a mutual benefit society the applicant declared his wish that it should be for the benefit of his "estate," but the association issued and he accepted a certificate which agreed that the association should pay the "family" of the member, the contract is expressed by the certificate, and not by the application.
3. In such case, the proceeds having come to the hands of the executrix of the member, who was also guardian of minor members of his family, she is chargeable as guardian for the share thereof belonging to her wards.
4. In the absence of any evidence that such applicant ever designated any beneficiary other than his "family" the fact that, after the certificate was issued, the by-laws of the society were changed so as to authorize the payment to any designated beneficiary, instead of limiting payment to the "family," is immaterial.
5. Where a certificate of membership in a mutual benefit society was payable to "the family" of the member, who left children by his surviving widow and one child by a former marriage, such child is one of the class designated as "the family" of the member, and entitled to his *pro rata* share of the proceeds.
6. The proceeds of a certificate of membership in a mutual benefit society, payable to designated beneficiaries, can in no proper sense be said to be any part of the estate of the member, and there can be no inference of intent to change the already designated beneficiaries by a mere residuary clause in the member's will.

7. A mother, who was also guardian of her minor children, filed a report stating that all of said minors were living with her, and that she made no change at that time on account of expenses, such as board and clothing, for any of the wards, and they continued to reside with her until her death, six months later, without her having receded from such expressed intention. *Held*, that the sureties on the guardian's bond were not entitled to an allowance for such board and clothing, when sued for a balance due from their principal.

8. Where a guardian ostensibly invested her ward's money in a loan to herself, giving notes and mortgages on her own property to her wards, the transaction cannot be treated as in any respect an investment of the trust funds.

9. In such case the mortgage may be treated as an application by the guardian of so much of her property to a repayment of the money improperly diverted, and, in an action therefor against the sureties on her bond, they are entitled to credit for all sums realized thereon.

10. Where a guardian ostensibly invested her wards' funds by a loan to herself, giving notes secured by mortgage on her own property, and a subsequent guardian, by pledging such securities, raised money which he expended for the wards' benefit, in an action against the sureties of the first guardian to recover such funds so wrongfully loaned, the sureties are entitled to a credit for the amount so expended by the second guardian for the wards.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Modified and affirmed.*

About November 7, 1893, there died, at Edgerton, Thomas Hutson, a man of considerable property and president of the Edgerton Bank, leaving a large amount of life insurance, some payable to himself, some specifically to his wife, and, in addition, policies as follows:

First. Two policies, aggregating $4,000, in the Bankers' Life Association, payable according to the certificate to the family of the deceased. The by-laws, when the certificate was issued, provided that benefits should be payable to the family, and were subsequently amended to provide that they should be paid to "the family or other designated beneficiary, upon receipt of the person designated in the original

application or by a subsequent acknowledged document." The application designated as beneficiary "my estate," and by a subsequent document, not acknowledged, Charles L. Burnham was designated trustee to receive the money.

Second. One policy for $2,000 in the Bankers' Life Association, the certificate payable to the family or other designated beneficiary, while the application designated four of Hutson's children by name, of whom the plaintiffs were three, and designated his wife, Martha Hutson, as trustee to receive payment.

Third. A policy of the Modern Woodmen for $2,000, payable to four children, designated by name, of whom plaintiffs *John F. Hutson* and *Myrtle Hutson* were two.

Fourth. A policy in the New York Life Insurance Company for $257.16, payable to four children, designated by name, among whom were plaintiffs *John F. Hutson* and *Myrtle L. Hutson.*

Fifth. A policy in the Equitable Life Association for $485.35, payable to the plaintiff *Roy J. Hutson.*

Charles L. Burnham, named as trustee in the first two policies, was cashier of the Edgerton Bank, and in connection with Charles T. Hutson, a son of the deceased, conducted the correspondence with reference to the collection of these various policies, which were paid as follows: "The $4,000, by a draft to Charles L. Burnham, trustee, upon a receipt signed by him as "Trustee for the Beneficiary, the Estate of Thomas Hutson." The second was paid by draft to Martha Hutson as trustee, upon her receipt as "Trustee for the Beneficiaries, *Roy James*, Maude Alice, Charles Thomas, *John Franklin*, and *Myrtle Leah Hutson.*" All the other policies were paid by drafts to, and upon receipts signed by, Martha Hutson as guardian. She was appointed guardian of the five minor children of the deceased and herself November 17, 1893, and was appointed executrix of the estate of Thomas Hutson on December 6, 1893. The several

insurance drafts were received in the intervals between her appointment as guardian and as executrix. As they were received, Burnham deposited them in the Edgerton Bank, and issued therefor certificates of deposit, which he placed in a box or receptacle containing papers relating to Thomas Hutson's estate, accessible to Mrs. Hutson, but which she personally never visited. These certificates of deposit varied in form. That for the $4,000 certified that Charles L. Burnham, trustee, had deposited $4,000, "payable to the family of Thomas Hutson on the return of this certificate properly indorsed." The certificate for the $2,000 from the Bankers' Life certified that Martha Hutson, trustee for specified children, had deposited $2,000, "payable to the order of —— on return of this certificate properly indorsed." The others certified that Martha Hutson, guardian, had deposited several sums. On June 29, 1894, while Mrs. Hutson was both guardian and executrix, all of these certificates of deposit were deposited to the general estate account in the bank, which was carried in the name of Thomas Hutson, and that account immediately thereafter was absorbed by a charge against it of notes due from Thomas Hutson, at the time of his decease, to the bank.

Thomas Hutson's will, executed in February, 1893, bequeathed $50 to each of his children, including the five children by Martha Hutson and one son by a prior marriage, and also $50 each to his two stepdaughters, and thereupon bequeathed and devised "all the rest and residue of my property, real, personal, or mixed, wheresoever situated, which I now own or may hereafter acquire, and of which I shall die seised or possessed," to his wife, Martha Hutson, whom he also constituted executrix. She filed an assumption of all debts of the estate, all persons supposing it then to be solvent, which supposition proved to be erroneous, in part, at least, by reason of the failure of the Edgerton Bank, which occurred in or about October, 1897.

On December 5, 1894, Martha Hutson, as guardian, filed a so-called report with the county court, commencing first with the inventory, describing the estate of the minors as no real estate and as personal property:

"Received for account of *Myrtle L. Hutson:*

"Bankers' Life Insurance Co.	$666.66
" " " "	400.00
New York Life Insurance Co.	64.29
Modern Woodmen Insurance Co.	500.00
From Estate of Thomas Hutson	50.00
	$1,680.95"

Like items were specified as received for the account of *John F. Hutson*, and items in like form, but differing according to the fact, as to *Roy J. Hutson*, aggregating $1,602.02. The so-called report then proceeds:

"Loan on note and mortgage bearing date April 1, 1894:

"For account of *John F. Hutson*	$1,630.95
Cash on hand for said account	50.00
	$1,680.95"

Same as to *Myrtle Hutson*, and same as to *Roy J.*, except his note was $1,552.02. The report concludes:

"Interest on above notes is payable annually on the 1st day of April, at the rate of six (6) per cent. per annum from date. All of said minor heirs are living with said guardian, and she will make no charge at this time on account of expenses, such as board and clothing, for any of them,"—dated November 15, 1894.

The report included as well the other then minors, who have since come of age. The notes and mortgage here described were notes of Mrs. Hutson to her several children, all secured by a third mortgage on a farm coming to her as devisee of her husband; the prior mortgages amounting to some $11,000. The notes to the several children were payable in the order of their respective majorities. Martha Hutson died in May, 1895, and her estate proved to be insolvent by reason of her assumption of her husband's debts.

Thereafter Charles L. Burnham was appointed guardian for the three children who are plaintiffs, received the notes and mortgage which had been executed by their previous guardian, collected two years' interest thereon, amounting to $195 for each of the minors, and raised $2,000 by pledging said three notes as collateral security to his own note, all of which moneys, with the exception of about $300, were expended by him for the support of his wards. After the failure of the bank he fled, and his sureties made settlement, under authority of the county court, whereby they paid $300, being substantially the unexpended balance of said $2,000, the defendant *Jenson* being one of such sureties.

The present action was thereupon commenced against these defendants as sureties upon the guardianship bond of Martha Hutson. It was stayed by order of court, pending the foreclosure of the several mortgages upon the farm. As a result of such foreclosure and sale thereunder the two prior mortgages were satisfied, and the notes first coming due to the two elder children were substantially satisfied, on the theory that such notes, by reason of their prior maturity, were prior liens, and a balance of $321 remained applicable to the three notes given to the plaintiffs. The trial court held that the $50 item credited by Martha Hutson as guardian to each of her children was never received by her as such, it being a legacy from her deceased husband, whose estate was more than exhausted by his debts, but held that all of the other items specified in the inventory above mentioned came to her in her capacity as guardian and she became responsible to account therefor, that the pretended loan to herself upon third mortgage was not a legitimate credit, and that the notes given might be rejected by the plaintiffs; but the sureties, declaring no preference, credited to the guardian's account the $321 realized upon the mortgage. He also credited the two years' interest which had been actually received by the succeeding guardian, Burnham, and,

except for these credits, held the guardian's debtor account to consist of the amount of each of said notes, with interest at the rate of six per cent. from April 1, 1894; for which sum judgment was entered against the defendants, from which this appeal is brought.

For the appellants there was a brief by *Jackson & Jackson* and *J. M. Clancy*, attorneys for *Jenson*, and *Sutherland & Nolan*, attorneys for *Attlesey*, and oral argument by *A. A. Jackson* and *G. G. Sutherland*.

For the respondents there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones*.

DODGE, J. This case presents one of those unfortunate situations where money claimed to be the property of helpless children has been lost by the conduct of the person intrusted therewith, in this case without any suggestion of turpitude or intentional wrong, but by mistaken confidence in the solvency of a bank and in the sufficiency of her own means to make good any losses, and where, on the other hand, the persons from whom indemnity is demanded are sureties merely, who have neither participated in the misconduct causing the loss nor received any benefit to compensate the burdens they have assumed. Such cases unavoidably arouse sympathy for each side of the controversy, and demand the most anxious care that no undue loss be permitted to fall upon the one side, nor burdens be imposed upon the other beyond the strictest letter of liability. Both helpless minors and those who, as sureties merely, guarantee faithful performance of the duties of guardians, are favored in the courts. Nevertheless, to the extent of the liability assumed by the surety, his contract must be enforced. It is as men *sui juris* and with full understanding of the purpose of their act that they execute the bond, upon the strength of which the property of those not able to protect themselves is placed in subjection to the discretion and will of another. Their

contract is to make good to those minors whatever may be lost by the improper or unlawful exercise of such discretion and will. No doctrine of estoppel or consent can be effective, as against minors, to authorize or excuse misconduct by their guardians, or to relieve from the liability in fact assumed by those who have guaranteed against such misconduct. In this case a mother, supposed by herself and every one else to have abundant means of her own, has so handled certain moneys claimed to belong to her minor children that they have lost the same. Her death in a state of insolvency soon after such conduct disappointed the expectations of all — herself, her children, and her sureties — that from her own means at any time could be made good any such moneys.

The first question naturally is, What moneys belonging to her children came to her hands under such circumstances that, as guardian, she owed the duty of care and reimbursement? The insurance money with which she is charged by the judgment in this case unquestionably all came within her custody and control at a time when she was guardian, and at a time, therefore, when it was her duty in that capacity to reduce to possession all moneys of her wards within her reach and to properly care for the same. As to the proceeds of all of the insurance other than that in the Bankers' Life Association there is no ambiguity. It was paid to her and receipted for by her in her capacity as guardian, and unquestionably belonged to her minors, subject only to the question whether it had been disposed of otherwise by the will of her husband, to be considered later. As to the moneys paid by the Bankers' Life Association upon the three certificates of membership issued to Thomas Hutson in his lifetime, neither the payment, the receipt, nor the ultimate disposal of the money can be said to be so entirely unambiguous as to make it proper to charge Mrs. Hutson's sureties with liability further than it shall be found that the

moneys in reality belonged to the minors for whom she was guardian. Those moneys, while undoubtedly coming within her control, so that she had full opportunity to carry into the guardianship estate all of them which belonged there, were in fact neither so carried into that estate specifically nor taken out of the general funds of the estate of her husband, but that she might have been chargeable either in her individual capacity or as executrix therefor, if they did not belong to the guardianship estate, and, if the latter view should prevail, her sureties should not be held liable for them.

As to the $2,000 received by her as designated trustee for certain specified children under a certificate of membership which promised payment "unto the family of said deceased or other designated beneficiary," issued upon an application designating the specific children as beneficiaries, there can be no hesitation in declaring the guardian's liability, subject to the question of disposition by will above suggested. The money came to her possession when she was guardian. True, it came to her as trustee; but the ownership thereof by her wards was clear and unambiguous. Such was the contract which Thomas Hutson had made with the association, and in that character and for that purpose was the money paid by that association and received by her. It was her duty as guardian to reduce that money to her possession in that capacity. Had it been in the hands of another, it would have been her duty to demand it. Being in her own proper possession, the law must treat her as holding it in the capacity in which it was her duty to hold it. As to this fund, therefore, her duty as guardian arose from the time it was paid to her by the association.

As to the moneys paid upon the two earlier certificates in the Bankers' Life Association, there is no room for hesitation. The money was paid by the association to Charles L. Burnham as trustee for the estate of Thomas Hutson.

It was by him placed in a certificate of deposit by its terms payable to the family of the deceased, and that certificate was by Martha Hutson deposited to her account as executrix. It was thus within her control, and, if the moneys belonged to her wards, she must be chargeable therefor. It is strenuously contended that such money did not belong to those minors, but did belong to the general estate of Thomas Hutson. This contention is predicated on the fact that in 1886 Thomas Hutson, in making application for this membership, declared his wish that it should be for the benefit of his estate. We perhaps need not consider what would have been the rights of the parties, had the association entered into contract with Thomas Hutson in accordance with this application. The books are full of discussion and decision as to the possibility of associations such as the Bankers' Life entering into contracts whereby the benefits they promise shall be payable into the general estate of the member, and thus inure to the benefit of his creditors, to the exclusion of his family and dependents. Extended discussion upon this subject will be found in Bacon, Benefit Societies, ch. VII; some authorities going to the extent of holding that such an application is so foreign to the ordinary purpose of a benefit society that the designation "my estate" will be construed to merely indicate generally the family or heirs of the member. *Eppinger v. Canepa*, 20 Fla. 262.

Such discussion is rendered unnecessary in this case, however, by the consideration that, not the application, but the certificate issued to Thomas Hutson by the association, expressed the contract between them. It was entirely within the power of the association to decline to make a contract upon the terms requested by the applicant, and entirely within his power to accept the contract which the association was willing to make. Indeed, there is much force to the contention that the association, under its by-laws as then

existing, had not the power to make a contract assuring payment to the general estate of Thomas Hutson. Whether it had power or not, however, it did not so contract. It issued to him, and he accepted and retained for many years, a contract which in terms promised that upon his death and after due proof the association "shall and will well and truly pay at the office thereof in St. Paul, unto the family of said deceased, upon receipt of said representative thereof, the sum," etc. This was the contract which was made and from which grow the rights of the parties. It is urged, and may well be conceded, that during the life of the member the designated beneficiary has no vested ownership in the fund nor in the contract between him and the association; that such contract can be terminated by the member, or a substituted beneficiary can be agreed on. In the light of this position, it is pointed out that before Thomas Hutson's death the power of the association was enlarged by by-law, so that it was empowered to promise payment of the stipulated sum to any other designated beneficiary. Such circumstance is, however, immaterial; for there is no proof offered that any attempt was made to change the contract as originally made. That contract, once made, must persist until changed in some way. The fact that originally Thomas Hutson requested a contract whereby the benefit should be payable to the estate, which the association refused to make, but made another whereby the benefit was promised to be paid to his family, surely is not effective to change this contract years afterwards. It may well be that after the amendment of by-laws in 1892 Thomas Hutson might have designated some beneficiary other than his family in the manner prescribed by these by-laws; but discussion of that question is bootless, for he did not do so. We are therefore constrained to the conclusion that the $4,000 paid by the association to Charles L. Burnham as trustee, at the moment of its payment, belonged to the family of Thomas Hutson, as was decided by the circuit court.

At the next step, however, we are persuaded the trial court went astray. Thomas Hutson had, at the time of taking this membership and at the time of his death, a wife and six children. Five of those children were hers as well. The sixth was by a prior marriage. No reason is apparent why the eldest son was not as much a member of the class designated as "the family" of the deceased as any of his other children. He is classed with the other sons by testator in his will, and if, as seems proper, the word "family" in this connection be construed as wife and children, this eldest son, Fred C. Hutson, was as much an owner in this fund as any of the other children. See *Jackman v. Nelson*, 147 Mass. 300. From this view it results that the share of each in this $4,000 was one seventh, instead of the one-sixth adopted by the trial court, or $571.43, instead of $666.66, a deduction of $95.23 from each of the three plaintiffs.

Apart from the foregoing considerations, it is further strenuously contended by the appellants that by the will of Thomas Hutson all of this insurance was made the property of his widow, Martha Hutson. That will contains a specific bequest of $50 to each of the testator's children by name and to each of two stepdaughters by name, and then bequeaths absolutely and in fee simple to his wife "all the rest and residue of my property, real, personal, or mixed, wheresoever situated, which I now own or may hereafter acquire and of which I may die seised or possessed." In attempted support of this contention the appellants' counsel have brought before us an array of decided cases which speaks eloquently their industry on behalf of their client and which we have little doubt fully exhausts the field of authority even apparently favoring them. We need not pass upon these authorities in detail. It may be said that they generally relate to cases of disposal of insurance moneys by express designation, or to cases where by the terms of the policy the money was to pass by will of the assured. Suffice

it to say, however, that we find no well-considered decision sustaining the proposition that a general residuary clause in a will is effective to transfer from one beneficiary to another insurance money the direction of which had already been declared by the contract of insurance. We are clear that under no ordinary circumstances should such clause be accorded such effect, for the reason that, standing alone, it evinces no such intention in the testator. Such moneys, payable by the insurance contract to designated individuals, can in no proper sense be said to be any part of the estate of the testator. True, the contract of insurance, while he is alive and so far as it has any value, may be said to be his; but that contract, at least in the case of benefit societies such as here presented, can hardly be said to constitute property. It is not a promise in any event to pay to the member. It does not present the situation of the ordinary insurance policy, where the payment of premiums year after year in excess of the insurance risk has built up a fund to which the assured might be entitled upon surrender of the policy. In its essence, it is simply an agreement on the part of the association that under certain circumstances money shall be paid to some one other than the assured, and at the utmost confers upon him a power of designation or appointment which gives him no title, ownership, or property in the fund agreed to be paid after his death. Bacon, Benefit Societies, § 237. This power of appointment is the only form of property which exists during his life, and in that the beneficiary has no vested interest. *McGowan v. Supreme Court I. O. F.* 104 Wis. 173; *Supreme Conclave R. A. v. Cappella*, 41 Fed. Rep. 1. Upon death of the assured that form of property ceases to exist, and there comes into existence a new property, to wit, a debt owed by the association, in which the beneficiary has vested rights and which never was the property of the assured. *Dietrich v. Madison R. Asso.* 45 Wis. 79; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682; *Holland*

v. Taylor, 111 Ind. 121; Bacon, Benefit Societies, § 237; *Greeno v. Greeno*, 23 Hun, 478; *Hellenberg v. District No. 1 I. O. B. B.* 94 N. Y. 580; *Maryland M. B. Soc. I. O. R. M. v. Clendinen*, 44 Md. 429. The great weight of authority, as of reason, is against the inference of any intent to change the already designated beneficiaries of life insurance by a mere residuary clause in a will, and we are convinced that no such purpose can be ascribed to the will of Thomas Hutson.

Thus we reach the conclusion that, except for the slight discrepancy as to amount, the trial court was correct in its view that the proceeds of all the insurance in question did come to the possession and control of Martha Hutson as guardian, and for its safe care and lawful application she was responsible, and her responsibility was guaranteed by the sureties upon her bond, the defendants in this action.

But it is contended by the appellants that credit should be given for support furnished these minor children by their mother and guardian during the year and a half of her life after her husband's death, to wit, from November, 1893, until May, 1895. The propriety of the allowance to a widowed mother, whether she be or be not guardian, for reasonable expenses incurred by her in the support of her minor children, out of their estate, need not be impugned or questioned. She has the unquestioned right, if she chooses, to support those children voluntarily and out of her own means; and, if she so elects, it lies not in the mouth of any one else to complain. *Taylor v. Hill*, 86 Wis. 99. In the record before us we find that at the end of the first year of guardianship, in filing her so-called inventory and report, Mrs. Hutson placed upon the records of the county court her declaration as follows: "All of said minor heirs are living with said guardian, and she will make no charge at this time on account of expenses, such as board and clothing, for any of them." After this declaration that situation con-

tinued for only another six months. We can place no other construction upon these words than that of an exercise of the mother's option to support her children out of her own funds,—an option from which she might doubtless have expressly receded at a future date, and by application to the court have been authorized to pay reasonable expenses out of the guardianship estate in her hands, but from which she never did expressly recede. Under the authority of *Taylor v. Hill, supra,* we cannot say that at the time of her death she could have successfully demanded, as a right, credit for the support of the children. We cannot accord to her sureties a right which she did not have.

Doubtless, after receiving her ward's money, the guardian might have discharged her liability by a safe and legitimate investment of the guardianship funds upon proper security. She did in fact ostensibly invest it in a loan to herself, by issuing to each of her wards her own promissory note for the full amount of the insurance money, and securing all of said notes by a third mortgage upon certain real estate, which is quite conclusively established to have been wholly inadequate as security. We cannot view this as an investment at all. Guardians must not confuse their trust capacity and their personal capacity in dealing with trust funds. No matter how good might have been the security given by the guardian upon the borrowing of guardianship funds from herself, it cannot serve as a credit further than moneys are actually realized therefrom. *In re Taylor Orphan Asylum,* 36 Wis. 534, 552; *Gillett v. Gillett,* 9 Wis. 194; *Cook v. Berlin W. M. Co.* 43 Wis. 433; *O'Dell v. Rogers,* 44 Wis. 136, 179; *Haywood v. Lincoln L. Co.* 64 Wis. 639, 647. The rule of these cases is that no dealing by one in fiduciary capacity with himself individually can prejudicially change the situation of the beneficiaries or their property. The application of this rule is not dependent upon the existence either of fraud or mismanagement; for its

foundation is in a sound public policy, which would exclude all necessity of investigation of either the honesty or the wisdom of such dealings in a dual capacity. Selfish instincts of human kind are so persistent that such dealings are fraught with peril to the fiduciary interests, and safety demands that the rule be absolute. The moneys in Mrs. Hutson's control as guardian were in no wise changed by this ostensible borrowing of them. They remained, as before, a liability against her in that capacity. The trial court was clearly correct in refusing to treat this transaction as in any respect a credit to the guardian as an investment of the guardianship funds. However, in the care and protection both of the minors and of the sureties, the mortgage may well be treated as an application by Mrs. Hutson of so much of her own property to the reimbursement of the moneys improperly diverted from her wards. As against her and as against her general creditors, whatever might in fact be realized out of such security to the wards should, of course, be applied to diminish their loss and the burden to be imposed upon the sureties. The sureties have the right to insist on such application and their exoneration *pro tanto.*

It appears that after Mrs. Hutson's death Charles L. Burnham was appointed guardian and received into his custody the promissory notes and mortgage given by Mrs. Hutson as above described, and received actual payment of two years' interest thereon, amounting to about $195 in behalf of each ward, and that he also received, as the result of pledging the notes and mortgage, the sum of $2,000; that he disbursed that $2,000 for legitimate expenses in support of the three plaintiffs while minors, to wit, between May, 1895, and the latter part of 1897, except about the sum of $300, which was in his custody and possession at a time when he absconded. That unexpended balance of $300 has been demanded by plaintiffs' guardian, and settled and

paid by Burnham's sureties, of whom the defendant *Jenson* was one, and has been received, $100 of it by the plaintiff *John F. Hutson* since coming of age, and the other $200 by the present guardian of the two minor plaintiffs, in satisfaction of Burnham's account, under the sanction of the county court. As to the two years' interest which Burnham, as guardian, received from this mortgage, the trial court allowed due credit in favor of the defendants, upon the theory, doubtless, that, so far as the wards actually received money from this security, they in effect received reimbursement of their moneys which had been in the hands of their mother; but he overlooked the fact that they had equally received the $2,000 advanced to them upon pledge of these securities. That money had gone to them as completely and effectively as if their mother had paid it over to a successor in guardianship. No reason is apparent why these sureties should be held to pay a second time an amount which the wards have thus actually received. We need not here consider the authority of *Burnham* as guardian to pledge these securities. That is immaterial to the question whether these wards shall again recover from the defendant sureties what they have already received upon their guardian's liability. *John F. Hutson*, after majority, has insisted that the proceeds of that pledging are his, has held his guardian to account for them, and made settlement with defendant *Jenson* as Burnham's surety on that basis. Not less conclusive and unambiguous has been the conduct of the general guardian of the two minor plaintiffs in asserting ownership of their shares of the proceeds of this disposal of their mother's mortgage, and that, too, under the order of the county court in charge of those estates. The three plaintiffs have received out of the moneys which passed into their mother's hands as guardian $2,000, for which the judgment in this case gives them a second recovery against these defendant sureties. In that respect it is erroneous and must

be corrected This amount was received July 1, 1897, and should be applied first to the one instalment of interest which became due from Mrs. Hutson as guardian on April 1, 1897, as the court finds. That interest is $288.84, and leaves $1,711.16 applicable to the principal of her indebtedness, and which should therefore draw interest to the date of the judgment. The excessive charge to the guardian of $285.69 on Bankers' Life Association payment, discussed previously, should draw interest from April 1, 1894, since the judgment rendered allows interest on the whole sum charged from that date. Upon this basis there must be deducted from the total judgment, as of its date, June 22, 1900, $2,697.85, apportioned $874.09 from the judgment in favor of *Roy J. Hutson* and $911.88 from the judgment in favor of each of the other plaintiffs.

By the Court.—The judgment appealed from is modified by substituting $2,993.50 in place of $5,691.35, where that amount occurs in the second paragraph; also by substituting $1,016.34 in place of $1,928.22 at each of the two places where the last amount occurs in said second paragraph; and also by substituting $960.82 in place of $1,834.91, where that amount occurs in said second paragraph. As so modified the judgment is affirmed, appellants to recover costs in this court.

HOULAHAN, Respondent, vs. CLARK and others, Appellants, and JENNEJOHN and others, Respondents.

March 20 — April 9, 1901.

Contracts: Performance: Agency: Mechanics' liens: Subcontractors.

1. Defendant C. engaged plaintiff to drive piling and place a building thereon, so that it might be used as a boat house, and instructed him to place the piling and building in line with a certain dock. Plaintiff placed the piling and building otherwise, and testified that

H., who claimed to represent C., instructed him to place them as he did. H. testified that he repeatedly told plaintiff defendant wanted the building on line with said dock. It was not shown that H. had any authority to change the contract, though it appeared he had acted for C. in some matters. *Held*, that plaintiff was not justified in departing from the contract and could not recover thereunder.

2. Where one who contracted to drive piling in a lake and place a building thereon is not entitled to recover because he has not placed the piling and building as agreed, those claiming as subcontractors for driving the piling cannot recover against the owner.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Armin & Waite*, and a supplemental brief and oral argument by *C. E. Armin.*

D. J. Hemlock, for the respondent *Houlahan.*

V. H. Tichenor, for the respondents *Jennejohn* and others.

CASSODAY, C. J. This action was commenced July 23, 1898, by *Patrick Houlahan*, as contractor, against *W. C. Clark*, *Helen N. Richmond*, and *Oriola M. Anderson*, as owners and tenants in common, and four others, as subcontractors, to enforce a lien for $272 for work, labor, and services in straightening and removing a building, driving and straightening piles, on the premises described adjacent to the shore of Lake Pewaukee, between December 9, 1897, and March 7, 1898. The four defendants claiming as subcontractors severally answered, setting up their respective claims as such. The defendants *Richmond* and *Anderson* severally answered by way of denials, and a disclaimer of any knowledge or information sufficient to form a belief in respect to any of the allegations of the complaint. The defendant *Clark* separately answered to the effect that he was the owner of the undivided one-third of the premises described, and that *Richmond* and *Anderson* each owned the undivided third thereof; that in the fall of 1897 he obtained

permission from his said cotenants to remove the building onto piles to be driven for that purpose adjacent to the shore on the premises described, and abutting thereon, and reconstruct the same for the purposes of a boathouse; that, aside from such permission, neither *Richmond* nor *Anderson* had any part or parcel in the contract made by him with the plaintiff, and that they had no knowledge thereof; that the plaintiff was to procure some one to drive the piles in the bed of the lake adjacent to the shore for supporting the building when moved, to be paid for by the defendant; that he pointed out to the plaintiff where the piles were to be driven and the building to be located, to which he agreed, and that the plaintiff was to place the building upon the piles as so agreed upon, and that the defendant was to pay the plaintiff for so removing and placing the building $75; that the plaintiff carelessly and negligently directed the driving of the piles, and did not have the same driven at the place agreed upon, and did not place the building at the place agreed upon, but did set the same in such manner as to render the building useless, and so that it did not conform to the portion of the lake which he had caused to be dredged, so as to be used in connection with such building when so located. The answer also alleged that some of the claims of the so-called subcontractors were for the same matters covered by the plaintiff's claims, and also reasons why the others should not be allowed. At the conclusion of the trial the court made findings of fact and conclusions of law, wherein it was found that the plaintiff was entitled to judgment for $228.25, with interest, as therein stated, and that the several subcontractors were entitled to judgment with interest, as therein stated, and that such claims were liens upon the respective shares of the premises owned by *Richmond* and *Anderson*, as well as *Clark*. From the judgment entered thereon accordingly, the defendants *Clark*, *Richmond*, and *Anderson* bring this appeal.

The plaintiff, as a witness in his own behalf, testified to the effect that he first talked with *Clark* about removing the building in August, 1897; that two or three weeks afterwards, and in September, 1897, he had his second talk with him, and that *Clark* then finally agreed to give him $75 for removing the building; that the stakes had not then been driven along where the dredging had been done; that *Clark* then told him that he wanted the building "in line with Zaun's dock;" that he did not want the building "to go out into the lake," because he did not want to fill in; that he wanted to keep it back close to the shore; that he then knew that *Clark* was going away,— that he told him so; that he did not see *Clark* again after that conversation in September, 1897, until June, 1898; that *Clark* trusted him to see that the building was properly set, and the piles properly driven, as he knew he would not be there; that there was no agreement as to what *Clark* would give for driving the piles; that he understood that it was his duty to see that the piles were put in right,—driven down tight into the bottom of the lake; that he charged $2 per day for sixteen days to "see that the piles were properly driven;" that he "superintended the driving of them,"—the piles the building was to rest upon; that he was present during all the time the piles were being driven; that they were driven according to directions given to the defendant *Yennie*,—placed according to those directions; that when he made the contract with *Yennie* he understood that *Clark* was to pay fifty cents and seventy-five cents apiece for driving such piles; that he "acted as superintendent in driving them,—acted for *Clark;*" that the piles were set by cutting a hole through the ice for each pile, and driving it through; that Husby told him to stop driving the piles until he could fill in with gravel; that Husby requested him to change the stakes; that they were not right with the dredged channel for the boats to go in, and that he (the plaintiff) should change them; that it would

have been just as easy for him to put it in the other way but that, if it was put in as *Clark* first mentioned, it would have been useless to him; that *Clark* told him not to let the building go away from the shore; that he did not want the filling, and that he told him it was impossible. At the time of making the contract in September, 1897, the parties necessarily contemplated that the piles should be driven with reference to the location of the building as then designated by *Clark*, and the dredging which had previously been done. The building was to be so located with reference to the shore, and so as to be "in line with Zaun's dock." The plaintiff was to drive, or superintend the driving of, the piles; and, so far as then contemplated, no one else was to have any direction of such driving. It is conceded that the building constructed was not "in line with Zaun's dock," but is very much out of line with that dock. The only excuse for locating the building entirely different than agreed upon is that the change was made by direction of one Husby, who claimed to represent *Clark*. But we fail to find any evidence in the record that Husby had any authority to so change the contract. The most we have is that he had acted for *Clark* in certain matters. *Clark* testified to the effect that the plaintiff agreed to drive the piles for $1 each, and to set the building on such piles for $75, and such sums were to be in full payment for all services and material; that he first saw the alleged completed work about June 1, 1898; that he then objected to the work, and refused to pay until he completed the same according to the contract; that when the contract was made he drove the corner stakes both on the land side and in the water; and that the building was to be set parallel with Zaun's dock; that the plaintiff set the building cornerwise, and not parallel with Zaun's dock, so that it spoiled his bathing place, and made it very difficult to get his steam yacht in and out of the building; that he denied that he ever sent directions to any one as to

the location of the building, but left the matter entirely with the plaintiff, and relied upon him to fulfill his contract; that he never gave any one except the plaintiff any direction as to the location of the building, in writing or otherwise. *Clark's* testimony is corroborated by Husby's, who repeatedly told the plaintiff that *Clark* wanted the building "parallel with Zaun's dock." We must hold, upon the great preponderance of the evidence, if not the uncontradicted evidence, that the plaintiff did not drive the piles nor locate the building as he had agreed, and hence had no right to recover therefor. It follows that the persons who claim as subcontractors for driving piles under the building as mislocated by the plaintiff have no claim upon which they can recover from *Clark*. As to the piles driven out in the body of the lake, we fail to find in the record any contract or evidence sufficient to prove a contract which would authorize a recovery from *Clark*, much less the enforcement of a lien on the building and shore. Of course, no lien could be acquired upon the bed of the lake, which belongs to the state.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the action.

WAGNER, by guardian *ad litem*, Appellant, vs. THE PLANO MANUFACTURING COMPANY, Respondent.

March 20 — April 9, 1901.

Master and servant: Personal injuries: Negligence: Fellow-servant: Obvious danger: Failure to warn.

1. Defendant's agent requested plaintiff, a boy fourteen years old, of ordinary health and intelligence, to assist him in putting trucks under a binder, and plaintiff was injured by the negligence of the agent in allowing the binder to tip over while plaintiff was so employed. *Held*, that plaintiff and the agent were fellow-servants of

defendant, and that plaintiff was entitled to the same protection as any other servant of defendant of similar age and intelligence, and was subject to the same risks of injury from the negligence of a fellow-servant.

2. In such case the danger of the machine falling over, being one within the common knowledge of boys as well as men, was not such a danger as called for a warning from defendant's agent before setting plaintiff at work, and failure in that regard did not constitute negligence.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries. The facts appearing upon the trial were substantially as follows: In June, 1898, the plaintiff, who was a boy a little less than fourteen years of age, of ordinary health and intelligence, was living at Waukesha, with Valentine Imig, who was his stepfather, and is his guardian *ad litem* in this action. Imig was an agent for the defendant, *The Plano Manufacturing Company*, and in 1897 had sold a binder made by said company to a farmer in the vicinity, who was unable to pay for the same, and in 1898 the machine was taken back from the farmer by another agent of the defendant, who thereupon sold it to Imig, with an agreement that a new pair of trucks should be furnished with the machine. The machine was upon a farm near Waukesha, and the trucks were afterwards procured and an attempt was made by Imig to place them under the binder, but it appears that they would not fit. Thereupon Imig notified the general agent of the defendant at Fond du Lac of the fact that the trucks would not fit; whereupon the agent sent an expert, one Diebler, to Waukesha to fit the trucks to the machine. Diebler called on Imig, and learned what the difficulty was, and Imig sent the plaintiff with a horse and buggy to take Diebler out to the farm and show him the binder and the trucks, in order that Diebler might fit them together. On arriving at the farm where the binder and trucks were,

there being no other man to assist Diebler, he requested the plaintiff to assist him, and the plaintiff consented to do so. In this operation, Diebler first directed the boy to get a block to prop up the binder, which he did, and, the first block not being long enough, he procured another. Diebler thereupon lifted up the binder, and told the plaintiff how to place the block so as to prop it up, and the boy placed the block under the binder, but Diebler said it was not quite solid enough, so Diebler lifted up the binder again, and the plaintiff placed the block in a better position, and then Diebler said, "It's all right," and then took the tongue out of the machine, and threw it on the ground, and told the boy to hold onto the trucks. In doing this, the boy had to go in front of the binder, and sat down upon the ground. While so holding the trucks they slipped off in some manner, and Diebler came back and put the machine on again, and said to the boy, "Hold them good," and turned away again, and as he was turning away the pressure threw the machine forward, the block fell, and an iron rod projecting down from the machine penetrated the plaintiff's leg, inflicting quite serious injuries.

The plaintiff claims that Diebler was negligent in failing to warn the plaintiff of the danger of the machine falling over, and also in failing to properly block or prop up the machine. A verdict for the defendant was directed, and from judgment thereon the plaintiff appeals.

For the appellant there was a brief by *Armin & Waite*, and oral argument by *C. E. Armin*.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

WINSLOW, J. When the defendant's agent, Diebler, requested the plaintiff to assist him in the work of putting the binder upon the trucks, and the plaintiff consented to do so, the plaintiff became for the time being defendant's servant

to all intents and purposes, and a co-employee of the defendant with Diebler, entitled to the same protection as any other servant of the defendant of similar age and intelligence, and subject to the same risks of injury from the negligence of a fellow-servant. *Johnson v. Ashland W. Co.* 71 Wis. 553; *S. C.* 77 Wis. 51. If there was serious danger and hazard in the work, which was not obvious, and which a boy of plaintiff's age and intelligence would not be expected to know, then he was entitled to be warned of *such* danger, and the failure of Diebler to so warn him would constitute negligence on the part of the defendant; for in this respect Diebler was undoubtedly a vice principal. If, however, there was no failure of duty in this respect, the subsequent failure of Diebler to properly block the machine would be simply the negligence of a co-employee, for which the defendant would not be responsible. *Klochinski v. Shores L. Co.* 93 Wis. 417.

The question to be decided, therefore, is simply whether the danger of the machine falling over was such a danger as called for a warning on the part of Diebler before he set the plaintiff at work.

Upon this question, it seems to us that the answer must clearly be in the negative. The placing of a binder upon its trucks is an operation of a similar character to many operations which are continually going on upon a farm, and in which boys of the age of the plaintiff are frequently called upon to assist. The danger of the machine falling over, if not properly blocked up, was patent to a boy of this age as well as to a man. There is, of course, danger in any operation involving the lifting and moving of heavy articles which may lose their equilibrium, but this danger is one within the common knowledge of boys as well as men. It would not be reasonable to hold that a boy must be warned that a heavy article may fall and hurt him, if not properly supported, every time he is asked to assist in moving it.

Warning is not required against obvious dangers in ordinary operations which are matters of common knowledge to all. Bailey, Personal Injuries, § 2730. The boy received an unfortunate and serious injury, but we are unable to see that the defendant is responsible for it upon any principle of law.

By the Court.— Judgment affirmed.

BOURDA, Appellant, vs. JONES, Respondent.

March 20 — April 9, 1901.

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Replevin: Landlord and tenant: Evidence: Inventory of hotel furniture: Memoranda: Offer of judgment: Practice: Value: Improbable evidence: Special damages: Interest: Immaterial error.

1. Plaintiff leased a summer hotel and its furnishings from defendant, stipulating that an inventory of the property therein should be taken before he took possession, and that he would return to defendant the same quantity and kind of property at the termination of the lease. No inventory was taken, though defendant had an inventory which had been taken at the close of the preceding season, which was shown to have been accepted as the inventory required under the lease. Plaintiff occupied the hotel two seasons, adding to the furnishings property of his own, and, on the termination of his lease, left all furnishings therein and, after due demand, replevied certain property therein, alleged to be his. On the trial defendant's son and daughter testified as to certain inventories each had made of the property in the hotel, the son's, being based on defendant's inventory made before plaintiff took possession, showed the property in the hotel before plaintiff went into possession, the articles he had left, the excess of property, and also the articles missing. Plaintiff offered similar memoranda prepared by his witnesses. *Held*, that such memoranda were properly received in evidence as part of the testimony of the witnesses.
2. Where an offer of judgment under sec. 2789, Stats. 1898, is made, the fact that the cause proceeded to trial is ample evidence that it was refused.
3. An offer of judgment under sec. 2789, Stats. 1898, is a proper instrument to be in the files of the case, and, on refusal to accept, it

drops out of the case until the final conclusion is reached on the facts, when, on attention being called thereto, it is the duty of the court to recognize and consider it in determining the question of costs.

4. Where an offer of judgment is made and refused, it is not error to award judgment for less than the offer, although such offer was not in evidence, said sec. 2789 prohibiting the consideration thereof by the court.

5. Evidence as to the value of household furniture which had been used in an hotel from one to five years, based on the theory that it was worth as much as when new, is contrary to all reasonable probabilities, and may be disregarded even though uncontradicted.

6. The plaintiff in an action of replevin testified that his special damages by reason of the wrongful detention of his property was a sum four times the value of the property as found by the court, and well up to the value that by any possibility could have been found upon the proof, and also testified that if he recovered the property it would be worth substantially as much as when new. *Held*, that the court, in assessing damages, might disregard such evidence as incredible.

7. In replevin where no special damages are claimed or established by the evidence, the proper rule requires an allowance, as damages, of interest upon the value of the property while the wrongful detention continued; but where the loss in that regard is trifling, the omission of such allowance is not prejudicial error.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Action of replevin for a quantity of hotel furniture. Plaintiff leased of respondent, for the season of 1897, a summer hotel with its furnishings, agreeing to return, at the termination of the lease, as much personal property in kind and quality as that covered by the lease, and to purchase for his use any additional furniture he might need. The lease was made February 27, 1897, and provided that the season should commence May 12th and end October 12th thereafter, and that before such commencement an inventory and appraisal of the personal property covered by it should be made. After the hotel was closed the preceding season respondent caused an inventory of his personal prop-

erty therein to be taken. The inventory required by the lease was not made, but the evidence tended to show that the fact that respondent had an inventory made the previous fall was brought to appellant's attention, and that it was understood that it should stand as representing the leased personal property. The lease was renewed for the season of 1898. At the end of such season plaintiff closed the hotel without taking away his personal property. Later he made a list of the property he claimed, which was in defendant's possession, and demanded the same. The demand was refused, whereupon this action was brought to recover the same.

All the material allegations of the complaint were put in issue by the answer. Defendant tendered judgment pursuant to sec. 2789, Stats. 1898, for a large part of the property claimed, with costs up to the time of such tender. The tender was refused. The cause was tried before a referee. Appellant, to establish his cause of action, testified that all the property described in the complaint belonged to him and that the various articles were worth the amounts set opposite them respectively in a list attached to the complaint, the aggregate being $822; that he fixed the value as indicated because that was what the property cost; that the articles had been used in the hotel business from one to five years, but that they were worth as much as when new. Plaintiff's wife, assisted by a servant, inventoried the property in the hotel after the close of the tenancy, and their inventory was the basis of appellant's claim. Mrs. Bourda testified to the correctness of the inventory, but said that when making it she did not have any list of respondent's property to go by and did not know what all the property was. To maintain respondent's side of the case his son testified that in the fall of 1896 he made an inventory of his father's property that was leased to appellant in 1897, and that he caused it to be recorded in a book which was pro-

duced. He presented a list which he said was a copy of the book, and it was allowed to go in evidence as a part of his testimony. He also presented a paper which he said contained a true list of his father's property that was in the hotel when appellant's tenancy commenced; that he made it from the inventory of 1896; that on the list there were columns of figures, one showing property in the hotel in 1896, another property when the first inventory was taken, and the third what was found in the hotel after the replevin papers were served. At another point he testified that the first paper presented was a copy of the inventory of 1896 taken from the book that was produced, and that the second list was a copy of the articles in the inventory of 1896 of the kind found in the hotel by him and inventoried after the suit was commenced. The second list had four columns, one representing articles owned by respondent in the hotel at the commencement of the tenancy, one, similar articles there when the inventory was taken by the witness after the tenancy terminated, one, the number of articles short, and the other, the number of articles in excess of what respondent was entitled to. Both lists were received in evidence against appellant's objections. Miss Maria E. Jones testified to having made an inventory of all the articles in the hotel after it closed for the season of 1898. She produced a list which she said was a correct exhibit of her work, written under personal directions as she called the articles off from the minutes of her inventory. The paper was allowed to be introduced as part of the witness's evidence. Respondent produced no evidence on the subject of value, except as to one article which he said was not worth over one fourth of what it cost when new.

The referee found in favor of plaintiff, that he was entitled to recover certain specified articles, not including a large part of the property claimed and much of the property for which judgment was tendered. He followed the list

made and verified by respondent's son, showing the excess of articles found in the hotel after the tenancy closed, over those belonging to respondent according to the inventory of September, 1896, which were turned over to appellant on May 1, 1897, according to the evidence of respondent's son, as such evidence is understood. The value of the articles found to belong to appellant, at the rate testified to by him, was over $300. The value found by the court was $50. The only evidence of damage was a general statement by plaintiff that he was damaged $200. He said he made that out because he had to buy articles to that amount, but that the property was worth as much as when it was bought. The damages were assessed at one dollar. The lease was put in evidence. The referee further found that appellant was entitled to a less favorable judgment than that tendered to him before the trial.

The findings and conclusions of the referee were substantially confirmed by the trial court. That was done by making new findings embodying the same conclusions as those reached by the referee, and the following, in substance: Plaintiff agreed in the lease to return to defendant all the personal property covered by the lease, in equal number, kind, and quality. Plaintiff vacated the leased premises at the termination of his tenancy and delivered possession thereof, with most of the chattels mentioned in the complaint, for the purpose of complying with the requirement of the lease that the lessee should make good to the lessor all property covered by the lease, at the termination thereof. The articles covered by the referee's finding were in excess of what defendant was entitled to recover. Judgment was rendered accordingly, costs being awarded to plaintiff up to the time of the tender, and subsequent thereto to the defendant. The plaintiff appealed.

Joseph B. Doe, for the appellant.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

MARSHALL, J. It is insisted that there was no evidence showing that appellant was not the owner and entitled to recover the property he claimed; that his alleged cause of action was *prima facie* established, and that there was no competent evidence to the contrary. That contention is based on the idea that the list of property produced and received in evidence, said to be a correct inventory of the property in the hotel when appellant took possession in 1897, and the inventories of the property found in the hotel after appellant left it in 1898, were improperly received in evidence. In that, counsel for appellant is in error. The inventory of 1896 was fairly shown to have been accepted as the inventory required by the lease to be taken on or before May 12, 1897. It was sufficiently verified to be admissible as part of the evidence of A. W. Jones, as was also the inventory taken by him in 1898, and the tabulation showing the excess of articles then in the hotel over what the lease required appellant to deliver to respondent. The same is true of the inventory made by Miss Jones. So the situation was that there was evidence on the side of respondent quite as satisfactory as on the side of appellant. We are unable to discover any basis for the claim confidently made by counsel for appellant that his case was clearly established and that the defense was wholly unsupported, except the assumption that the verified inventories and the tabulation of the result of comparing the inventory of the property respondent's witnesses said appellant received and that of the property he returned, were improperly received in evidence. The several lists received in evidence as part of the testimony of respondent's witnesses were quite as well verified as the list put in evidence by appellant to substantiate his claim. The lists on both sides were made and verified in substantially the same way and were received in evidence in connection with and as a part of evidence of witnesses who made them, under the same rule. They were not re-

ceived as independent instruments of evidence. They were used for the purpose of aiding the witnesses who testified to their correctness in giving evidence of facts within their knowledge, or that were within their knowledge when the lists were prepared or the memoranda were made from which the lists were compiled. A witness, in testifying, may properly use a memorandum which he knew when made, or by subsequent verification thereof, to be correct, even though he does not possess present remembrance of the correctness of the matters referred to therein, after seeing the paper and examining it, and even though the writing is not one that the witness made himself. In such a case, if the witness, after using the paper to refresh his memory, cannot state the facts readily from personal recollection, but can state that he knows the paper was in accordance with the truth when it was made, it may be put in evidence as a part of his testimony. Jones, Ev. §§ 877–886, inclusive. We see no reason why the referee was not warranted in receiving in evidence all the verified lists upon both sides and giving such weight thereto in connection with the other evidence as he believed the same were entitled to, and in finally concluding that the evidence produced by respondent, in respect to the amount of property plaintiff was entitled to, was in accordance with the truth, and in deciding accordingly.

It is said there was error in finding that there was an offer of judgment which was more favorable to appellant than the final decision, because the offer was not introduced in evidence. The learned counsel must have failed to read sec. 2789, Stats. 1898, under which the offer was made. That provides that the offer, if not accepted, cannot be put in evidence or considered on the trial, but that notice shall be taken of it in determining whether the party to whom judgment is offered, in case he recovers, is entitled to full costs or only costs up to the date of the offer. There can be no

controversy but that the offer of judgment was actually served. It has an admission of service indorsed upon it by appellant's counsel. The fact that the case proceeded to trial after the offer was made is ample evidence that it was refused. The paper was a proper instrument to be in the files of the case, and when it was called to the attention of the referee it was his duty to recognize the effect thereof under sec. 2789, as he did.

Complaint is made because the referee did not allow appellant at least all the property specified in the offer of judgment. At this point counsel seems to recognize the fact that the existence of the offer of judgment could not properly be entirely overlooked. The answer to his proposition, however, that the referee should have considered it in determining the facts, is that the statute expressly prohibits such consideration. When an offer of judgment is made under sec. 2789, and is refused, it drops entirely out of the case till the final conclusion is reached on the facts, and then it must necessarily be considered in determining the question of costs.

It is contended that the evidence of value on the part of plaintiff was clear, satisfactory, and undisputed, and that there was no evidence whatever to warrant the court in finding the value at $50 or any less than the amount indicated by the testimony of plaintiff. We are unable to find the clear and satisfactory evidence spoken of. Appellant testified that the property, though it had been in use in a hotel from one to five years, was worth as much as when new, and his values were put upon that basis. The evidence was clear, to be sure, but clearly outside the realms of all reasonable probabilities. It has often been said that courts and juries are not obliged to find that a fact exists, and cannot properly do so, merely because there is evidence to that effect from the mouth of a witness or any number of witnesses. A sworn statement, which is obviously false when viewed

in the light of reason and common sense and facts within common knowledge, cannot be received in court as true because some witness wilfully or ignorantly or recklessly so testifies. *Badger v. Janesville C. Mills*, 95 Wis. 599; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Flaherty v. Harrison*, 98 Wis. 559; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382. It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it establishes the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts — testimony which no sensible man can believe — goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded. If it is the only evidence in respect to the fact involved, it is ordinarily deemed sufficient to establish such fact. *Engmann v. Estate of Immel*, 59 Wis. 249. Where the value in controversy relates to an article, the value of which is within common knowledge, the fact may be found by court or jury without direct testimony thereto, the article being sufficiently described by evidence to enable one to apply to it common knowledge of value. At the same time, evidence of witnesses, though uncontradicted, placing the value of an article beyond all reason, should be entirely ignored. *Hossler v. Trump*, 62 Ohio St. 139. The court in that case, to illustrate, suggested that evidence that labor, ordinarily worth $3 per day as a matter of common knowledge, is worth $100 per day, is not entitled to any consideration. If there is anything that is within common knowledge, it is that the value of household furniture and utensils that have been in use for a number of years, however well the same may have been cared for, is largely below the value thereof when new. The testimony of appellant that his property was worth as much as when new, did not prove or tend to prove the true value. So the referee, without any accurate description of

the property or its condition, was left to guess at the value thereof. The burden of proof was on plaintiff. His case was submitted on the issue of value for a judicial guess, and it is considered that he cannot complain of the result. This court is certainly in no better position to know the truth than the referee was. As we view it, there was practically a failure of proof on the subject of value.

A further complaint is made because the court assessed appellant's damages, for the wrongful detention of the property, at $1, in the face of his evidence that such damages amounted to $200. On this point we might repeat what has been said in regard to determining a fact in controversy where there is no credible evidence in regard to it. According to appellant's evidence, viewing it with reference to the property he recovered, his damages for the wrongful detention thereof were about four times what the court found its value to be, and well up to the value that by any possibility could have been established by proof; yet he said that if he recovered the property it would be worth substantially as much as when new.

No special damages were claimed in the complaint or established by the evidence, so the proper rule required the referee to allow, as damages, interest upon the value of the property while the wrongful detention thereof continued. *Bonesteel v. Orvis*, 22 Wis. 522; *Bigelow v. Doolittle*, 36 Wis. 115; Wells, Replevin, § 537. That was overlooked by the referee and by the trial court, but the loss to appellant thereby is too trifling to justify regarding the error as substantially prejudicial to him.

Some other points are referred to by counsel, but we have noticed all that seem to be regarded as of special significance. We are unable to discover any reversible error in the record.

By the Court.—Judgment is affirmed.

KOCH, Respondent, vs. HUSTIS and another, Appellants.

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March 20 — April 9, 1901.

Appeal: Notice: Service: Erasures: Presumptions.

1. The record must affirmatively show service of the notice of appeal to the supreme court on the respondent or his attorneys and the clerk of the proper court, or the court will decline to assume jurisdiction and dismiss the appeal.
2. A notice of appeal was indorsed in typewritten words "Services admitted, May ——, 1900." Underneath the names of respondent's attorneys had been written, and the words, "Plaintiff's Attorneys" and "Clerk of Said Court," typewritten. Through all of such words and figures a pen had been drawn, and over all the filing stamp of the clerk of the county court had been placed. *Held*, that the supreme court could not presume, in the absence of any date, that the erasures were made after service, or that service was in fact made.
3. While the fact that a notice of appeal was filed with the clerk, and had been returned by him with the record, may raise a presumption of service upon him, it does not aid a failure of proof of service on respondent or his attorneys.

APPEAL from a judgment of the county court of Dodge county: J. A. BARNEY, Judge. *Appeal dismissed.*

For the appellants there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler.*

For the respondent there was a brief by *Sanborn, Luse, Powell & Ellis*, and oral argument by *A. L. Sanborn.*

BARDEEN, J. The record in this case fails to show that the notice of appeal was ever served upon the respondent's attorneys. On the back of the notice there appears to have been typewritten the words, "Services admitted, May ——, 1900." Underneath, in writing, are the names of Malone & Bachhuber, who were plaintiff's attorneys in the court below. Immediately below are the typewritten words, "Plaintiff's Attorneys," and "Clerk of Said Court." A pen has been

drawn through each of the words and figures above quoted, and over all is the filing stamp of the clerk of Dodge county court. When or by whom these erasures were made we are unable to say. No explanation has been offered, and we have only the bare facts above recited for our guidance. If the admission of service had been dated, it might be presumed that such erasures were made after service. As it is, no such presumption can arise. So far as service of the notice of appeal upon the attorneys is concerned, it cannot be allowed to rest upon presumption. The record must affirmatively show that such service has been made, or this court will decline to consider the appeal. Such was the rule announced in *Eaton v. Manitowoc Co.* 42 Wis. 317, and which has been adhered to ever since. It is the *fact* of service that gives this court jurisdiction to proceed. Unless proof of such fact affirmatively appears, we must assume that jurisdiction has not been obtained, and dismiss the appeal. In *Yates v. Shepardson*, 37 Wis. 315, the record was sent to this court on the strength of a stipulation signed by the attorneys of the respective parties, each admitting service of a notice of appeal. No proof of service on the clerk appeared in the record, and the appeal was dismissed. The plain object of the requirement is to prevent the court being imposed upon or being called upon to consider moot cases. There is not, however, the remotest suspicion that anything of this kind exists in this case. We are unable to imagine any explanation of the circumstances. The cold fact appears that the record fails to show service of the notice of appeal upon the adverse party, and we cannot indulge in inferences or deductions to supply the record. The fact that the notice of appeal was filed with, and has been returned by, the clerk with the record may be deemed a sufficient service on him, under the rule established in the case of *Mackin v. Madden*, 104 Wis. 61; but this does not help out the imperfection mentioned.

By the Court.— The appeal is dismissed.

BLAIR and others, Respondents, vs. MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Appellant.

March 21—April 9, 1901.

Highways: Establishment: Conclusiveness of description in order: Surveys.

1. Sec. 58, ch. 19, R. S. 1858, required the supervisors to make a description of a highway as laid out and "incorporate the same in an order" signed by them and recorded in the town clerk's office. Sec. 59 provided that such order "shall be *prima facie* evidence of the regularity of all the proceedings prior to the making" thereof. *Held*, that the description in such an order is conclusive as to the location of the highway and cannot be contradicted by the evidence of the person who made the survey or by his written memoranda thereof, and that, if the description is so indefinite that the highway cannot be located therefrom, the order is void.
2. Where the monuments stated in the description of a highway as contained in the order laying it out cannot be located from such order, but only by resort to the original survey, the situation does not come within the rule that courses and distances must yield to monuments, and that in cases of ambiguity practical construction may be resorted to.

APPEAL from an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan.*

For the respondents there was a brief by *Frame & Blackstone*, attorneys, and *W. J. Turner*, of counsel, and oral argument by *Mr. H. J. Frame* and *Mr. Turner.*

CASSODAY, C. J. This is an appeal from an order appointing commissioners for the condemnation of a strip of land occupied by the defendant, and made upon the petition of the plaintiffs, as landowners. Such condemnation is resisted on the sole ground that the *locus in quo* is within the limits of what is known as Delafield street or highway, as located

and laid out by the board of supervisors June 14, 1858, and that such occupancy has been authorized by the city. It is conceded that the original order of the supervisors, as it appears of record and of itself, fails to describe the Delafield road, or any part of the strip of land here sought to be condemned. The contention is that the description in that order is ambiguous, and in fact absurd, and should be construed according to the actual survey made at the time, which is preserved in writing with the records of the town. That is to say, the words "thence north eight minutes, and four degrees *west*," contained in the order, should be construed to mean "thence north eight degrees, four minutes *east*," as contained in the survey; and so the words "north fifty-nine minutes, and two degrees *west*," contained in the order, should be construed to mean "north fifty-nine degrees, two minutes *west*," as contained in the survey; and so the words "thence north forty-nine minutes, thirty degrees west," contained in the order, should be construed to mean "thence north forty-nine degrees, thirty minutes *west*," as contained in the survey. In support of such contention counsel urge the well-recognized rule that courses and distances must yield to monuments, and in case of ambiguity practical construction may be resorted to. *Racine v. J. I. Case P. Co.* 56 Wis. 539; *Miner v. Brader*, 65 Wis. 537; *Racine v. Emerson*, 85 Wis. 80; *Madison v. Mayers*, 97 Wis. 410, 411; *Heinselman v. Hunsicker*, 103 Wis. 12. It is claimed that the order in question contains such monuments. Thus, counsel calls attention to the fact that the order mentions as such monuments a "burr-oak tree," also a "white-oak tree," also a "bridge over Barnard's race," and also "the town line of Pewaukee." Such so-called monuments are mere bearings at certain distances from stakes set by the surveyor. But to find the first stake, thirty-seven links from the "burr-oak tree," it is necessary to go thirteen chains from the starting point, on the course mentioned in the sur-

vey, "east," instead of the course mentioned in the order, thirteen chains "west;" and similar difficulties are encountered as to such other bearings. In other words, it is impossible to say from anything contained in the order that any portion of the *locus in quo* is within the limits of the highway laid out or attempted to be so laid out June 14, 1858. The statute then in force required the supervisors to "make out a description of the highway so laid out, altered, or discontinued, *and incorporate the same in an order* to be signed by them, and shall cause such order to be filed and recorded in the office of the town clerk, who shall note the time of recording the same in the record." Sec. 58, ch. 19, R. S. 1858; sec. 1269, Stats. 1898. The statute at the time also provided that "the order laying out, altering, or discontinuing any highway, or a copy of the record thereof, duly certified by the town clerk, shall be received in all courts and places as competent evidence of the facts therein contained, and shall be *prima facie* evidence of regularity of all the proceedings prior to the making of such order." Sec. 59, ch. 19, R. S. 1858; sec. 1298, Stats. 1898. Thus it appears that the statute required the description of the highway to be incorporated into the order signed by the supervisors, and that such order, or a certified copy thereof, should be competent evidence of the facts therein contained. If the description in the order is so indefinite that the road therein mentioned cannot be located therefrom, then the order is void. *State ex rel. Funke v. Burgeson*, 108 Wis. 174. If, on the contrary, the description therein contained is definite and certain, yet, since no part of the land here sought to be condemned comes within the description therein given, it follows that such order is no ground for resisting such condemnation proceedings. We must hold that the description contained in the order is conclusive upon all parties, and cannot be contradicted even by the surveyor who made the survey, nor his written memoranda of such survey.

By the Court.— The order of the circuit court is affirmed.

VILLAGE OF PEWAUKEE, Appellant, vs. WISCONSIN LAKES ICE & CARTAGE COMPANY, Respondent.

March 21 — April 9, 1901.

Injunction: Landlord and tenant: Privity: Parties.

1. The owner of the paper title to premises claimed to be part of the bed of a navigable lake leased the premises for a term of years, and his lessee began the erection of buildings thereon. *Held*, that an injunction would not lie against the landlord to prevent such erections or to compel their removal.
2. In such case, the tenant, claiming under a conveyance made prior to the commencement of the action, is not in privity with the landlord and could in no degree be concluded by judgment against him.

[3. Whether in such case the landlord might not be a proper party to an action for an injunction against the tenant, predicated upon absence of any title in either of them to the land in question, not determined.]

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

This was an action to enjoin the erection of hotel buildings, docks, etc., on the margin of Pewaukee Lake, and west of Main street, in the village of *Pewaukee*, at a point a few hundred feet north of the *locus* involved in the case of *Pewaukee v. Savoy*, 103 Wis. 271, and to compel removal of work already done. It appeared that Main street substantially followed the course of a milldam constructed about 1838, by which the natural elevation of the waters of Pewaukee Lake had been increased to a considerable extent, so that portions of the shore, in their natural state dry land, had for many years been submerged. There was controversy whether at the point in question a narrow strip of land about ninety feet long on the west side of Main street, paper title to which was in the defendant, had remained unsubmerged for twenty years. Upon this subject much conflicting evidence was given.

It was, however, made to appear without substantial controversy that the defendant, having paper title, had some time shortly prior to the commencement of this suit executed a formal and complete lease for fifteen years of the ninety-foot strip of land west of Main street to one Leidel, and that the acts complained of were preparatory operations by him for the erection of a hotel building thereon, and piers to connect the same with the navigable waters of Pewaukee Lake; that the defendant had no participation in or connection with said acts, except that it knew in leasing that Leidel contemplated such improvements. The trial court entered judgment dismissing the complaint on the merits, from which the plaintiff appeals.

For the appellant there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan*.

For the respondent there was a brief by *Timlin, Glicksman & Conway*, and oral argument by *Nathan Glicksman*.

DODGE, J. One fact found by the trial court and fully established by the evidence is conclusive against the propriety of an injunction, such as prayed in the complaint, against this defendant. That fact is that the defendant has not done and is not threatening to do any acts whatever upon the strip of land in question. At the time of the commencement of this action one Leidel had acquired all defendant's rights for a term of fifteen years by a lease. During that term defendant had no power either to direct or to control Leidel in his occupation or enjoyment of the premises. What purpose, then, could be served by enjoining the defendant from placing obstructions which it neither intended nor desired to place? Courts of equity do not fulminate injunctions needlessly, but only to prevent imminent and irreparable injury. 1 High, Injunctions, §§ 22, 23. The further prayer in the complaint for mandatory injunction commanding defendant to remove obstructions placed by Leidel is

even more beyond the power of the court in this action. Defendant could no more enter upon the leased premises or upon the lake and tear down Leidel's work than could any stranger. Leidel, claiming as he does under a conveyance prior to the comencement of this action, is not in privity with the defendant, and could in no degree be concluded by judgment herein. 1 Freeman, Judgments, § 186; *Stridde v. Saroni*, 21 Wis. 173; 21 Am. & Eng. Ency. of Law (1st ed.), 139, 141. We are not prepared to say that this defendant might not be a proper party to an action for injunction against Leidel predicated upon absence of any title in either of them to the land sought to be conveyed by the lease, but only so far as it is interested in the latter question. In the absence of the real party in interest, Leidel, whom judgment in this action will not bind, we should not be justified in deciding the important questions raised and argued. We deem it proper, however, to call attention to the incompleteness and insufficiency of the evidence to render certain the facts to which rules of law must be applied in concluding upon the rights of the real contestants. Plaintiff insists that the true boundary of Pewaukee Lake is the ordinary high-water line which has been customarily reached for the prescriptive period of twenty years, and that such line is in contact with Main street. Defendant denies this rule of law, and contends for the ordinary low-water mark as the limit of legal submerger, but also insists that neither of said lines has been maintained long enough or persistently enough in contact with the street to reduce to public ownership a somewhat indefinite strip of original land west of the west line of the street. The location of these respective lines is left quite uncertain, but especially the persistency or frequency with which either has been maintained, as also the length of time. There is hardly any evidence on this subject going back of 1885, and since then the periods during which the waters have reached or rested at any given point

are left indefinite, whether monthly, yearly, or only at longer intervals. Further, certain instances of either high or low water are clouded with uncertainty as to whether they were due to ordinary or to exceptional conditions and circumstances. In a case of this significance, where are at stake the private ownership of valuable riparian lands on the one side, and on the other important public rights of control over the connection between land and water highways, the exact facts should be made to appear clearly and definitely before the court is asked to apply the law and finally adjudge those rights.

The record before us is somewhat indefinite as to the grounds on which the trial court decided in favor of the defendant. The ground first above stated clearly appears in the findings, and is supported by the proofs. We construe the judgment as resting on that alone, and base affirmance on that construction.

By the Court.—Judgment affirmed.

IN RE BUTLER'S WILL.

March 21—April 9, 1901.

Wills: Probate: Appeal: Executors: "Party aggrieved:" Evidence: Nonexpert witnesses: Mental capacity: Undue influence.

1. Where a judgment of the county court admitting a will to probate was reversed by the circuit court after the executor had qualified and entered upon the duties of his trust, the executor, in his official capacity, is aggrieved thereby, and is entitled to prosecute an appeal to vindicate and protect his trust.
2. Opinions of nonexpert witnesses as to a testator's mental capacity to make a will have little probative force, where the acts and conversations of the testator, on which such opinions are based, show merely mental eccentricities, as distinguished from weakness of mind or delusions affecting testamentary capacity.

3. The test as to whether a testator has sufficient mental capacity to make a will is not whether he did the best or the wisest or the theoretically just thing in his will, but, whether he had sufficient active memory to collect in his mind and comprehend, without prompting, the condition of his property, his relations to his children and other beneficiaries, and the scope and bearing of his will, and to hold these things in his mind a sufficient length of time to perceive their obvious relations to each other, and be able to form rational judgment in relation thereto.

4. In a contest over the probate of a will, the evidence—stated in the opinion—is *held* insufficient to show that the testator lacked mental capacity to make the will or that his free agency was destroyed or impaired by the influence of others.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

This is a contest over the probate of the alleged will of William Butler, deceased. The contestants are adult children of the decedent, and they allege lack of mental capacity on the part of the deceased, as well as undue influence. The will was admitted to probate in the county court of Waukesha county, and the appellant, *Templeton*, who is named as executor in the will, duly qualified and received letters testamentary. Upon appeal to the circuit court the issues were tried by a jury, and the jury found that the testator lacked testamentary capacity, that he did not have knowledge of the terms of the will, and that the will was the result of undue influence. These findings were adopted by the circuit court, and the judgment of the county court admitting the will to probate was reversed, and the executor appeals.

There was no contest on the trial as to the execution of the will in proper form. The evidence showed that William Butler, the testator, was at the time of the execution of the will (January 24, 1900) a man past seventy-three years of age; that he was a farmer; and that for fifty years he had lived on his homestead, in Waukesha county, and had accumulated an estate of real and personal property inven-

toried at $13,000. He left a family of four sons and eight daughters, all of whom were adults at the time of the execution of the will, and most of them had families of their own. The testator was a man of little education, who read print with difficulty, and could barely write his name, but was a practical, hard-working farmer, in good health up to the last two years of his life. In his earlier years he had been a drinking man, and about fifteen or twenty years before his death his team ran away with him, injuring his left eye, since which time he had not used much liquor. About two years before his death he had caught cold in his injured eye, and inflammation had set in, and it had caused him considerable pain up to the time of his death. The children were all industrious, and worked on the farm in their earlier years. The elder boys, William and James, with their father's aid had purchased farms in the vicinity and moved on to same. All of the girls except *Georgiana* married neighboring farmers, and lived in the vicinity, except *Agnes McIntyre*, who moved to Iowa. For some years prior to 1895 the sons *Andrew* and John worked the homestead farm together and operated a threshing outfit, the father and mother and *Georgiana* living with them. In 1895 trouble arose between *Andrew* and John concerning the division of profits in the threshing business, and *Andrew* left home and bought a farm of his own. John, however, continued to work the home farm; but the disagreement above mentioned continued to grow, and involved the other members of the family, until the ill feeling became acute. The sons John, James, and William were upon one side of this difficulty, and *Andrew* and the girls upon the other. The mother took sides with the latter faction, and for about a year before her death John, James, and William did not visit her, she having requested them to remain away from the house. The testator, however, visited at his sons' residences and became reconciled with John. When John left the home farm, his tenancy

was suceeded by that of William Russell, a son-in-law who had married the daughter *Jane;* and the family then consisted of Mr. Butler, the testator, his wife, his daughter *Georgiana*, his daughter *Jane*, and her husband. After this change the relations between the old gentleman and the rest of his family at the home farm were no more pleasant than before. Mrs. Butler, who was a year older than her husband, became sick in November, 1899, and died December 26, 1899. The relation between the testator and his wife were not very cordial, and he expressed little solicitude for her in her last illness, and was not much affected by her death. After her death the son *Andrew* paid his mother's funeral expenses, and the testator did not like it. January 5, 1900, *Andrew* made a petition for the appointment of a guardian over his father, and caused notice of the application for the appointment of a guardian to be served upon him by an officer. On the day that he received the notice he took it to his sons William and James to find out what it meant, and they, at his request, took it to *Mr. Templeton*, the executor, to advise with him about it. They also consulted an attorney as to the effect of the proceedings upon their father's power to make deeds and sell his property. The proposal to appoint a guardian seems to have angered the old gentleman, and the family feud increased thereby. On January 22, 1900, the son William and the testator went to *Templeton's* house, in the village of Templeton, a distance of four or five miles; the son driving him over with a horse and buggy. On arriving at Templeton the testator asked *Templeton* if he could draw a will, and *Templeton* said he could; and they had a conversation of an hour and a half, during which the testator and *Templeton* were entirely alone. The testator had with him a list of his children, upon which *Mr. Templeton* noted opposite each name what property the testator wished each child to have. *Templeton* started to draw a will, but, concluding that he had not sufficient data to correctly de-

scribe the real estate, he made a memorandum of Mr. Butler's wishes; and the testator went home, with the understanding that *Templeton* would complete the will as soon as possible, and send for the testator to have it executed. At this interview Mr. Butler informed *Templeton* that he desired Henry T. Jeffery and John A. Rogers to act as witnesses to his will, and he requested *Templeton* to send word to his son William when the will was ready for execution. On the same day *Templeton* went to Waukesha with his memorandum, and went directly to the register of deeds' office, and procured William Swan, deputy register of deeds, to assist him in perfecting the descriptions of real estate and drawing the instrument. The will was written, except the attestation clause, and *Templeton* took it back home, with the understanding that Swan would come out when sent for to see it signed. *Templeton* sent word by letter to the son William to meet at his house January 24th and execute the will. Those present that day were *James Templeton*, John A. Rogers, Henry T. Jeffery, William E. Swan, Andrew Templeton, William Butler, the testator, and his son William Butler, Jr., the latter of whom drove his father over in a buggy. *Mr. Templeton* informed Mr. Butler that the will was ready, and William Butler, Jr., and Andrew Templeton withdrew to the kitchen. *James Templeton*, William Swan, and the testator went into the parlor and closed the doors. The will was read over paragraph by paragraph to Mr. Butler, and he seemed to comprehend it, and suggested no changes. When they came out of the parlor, William Swan asked the testator if he could sign his name, and he said, "No;" but he said to the witnesses that this was his will, and requested them to sign it, and that he was not influenced in making it by any one. He signed the will by mark, Mr. Swan holding the pen. The will being executed, the party dispersed, and the will remained in the possession of *Mr. Templeton* until offered for probate. February 7, 1900, he

left his homestead, and went to the home of his sons John and James, where he died February 25, 1900. He had been gradually failing in health for some time, but was able to walk about up to the time when he left his homestead. A large amount of nonexpert evidence was introduced as to his capacity to make a will. By the will he left thirty-nine acres of land to his son James, seventy-seven and one-half acres to his son John, thirty acres to his son William, $50 each to his daughters *Sarah J. Russell*, *Georgiana Butler*, *Margaret G. Jeffery*, and *Jane E. Russell*, and $50 to his son *Andrew L. Butler*. To his daughter *Georgiana*, in addition, he gave two and one-half acres of land in the village of Sussex. The balance of his personal estate he gave to his daughters *Marion L. Booth*, *Agnes McIntyre*, Elizabeth M. Howard, and Harriet P. Craven, in equal shares. The will was contested by seven of the children; William Butler, James D. Butler, John A. Butler, Elizabeth Howard, and Harriet P. Craven not joining in the contest.

For the appellant there was a brief by *Tullar & Lockney*, and oral argument by *D. S. Tullar* and *Henry Lockney*.

For the respondents there was a brief by *Ryan & Merton*, and oral argument by *T. E. Ryan*.

WINSLOW, J. A preliminary objection is made by the respondents that the executor is not aggrieved by the judgment refusing to probate the will, and hence cannot appeal. The principles stated in the case of *In re Luscombe's Will*, 109 Wis. 186, are decisive against this contention. In that case the appellant was a testamentary trustee who appealed from a judgment cutting off the rights of unborn *cestuis que trustent*, and it was held that the trustee was both entitled and bound to protect their possible rights by appealing. Here the appellant is an executor who has qualified and entered upon the duties of his trust. While so acting a judgment is entered putting an end to his trust and to the right

of the beneficiaries thereunder. It seems very clear that it is the duty of the executor to protect and enforce his trust, and to take all such steps as in the exercise of sound judgment seem reasonably necessary for that purpose against persons who are seeking to destroy the trust. Any other course would constitute a dereliction of duty. *Hesterberg v. Clark*, 166 Ill. 241. Were the contest simply one between two beneficiaries, *sui juris*, to settle their respective rights under the terms of the trust, the question would be different, and it might perhaps be said that the trustee would not be aggrieved by a judgment determining their rights, because the trust itself is not attacked, but simply interpreted; but, where a judgment effectually destroys the trust, there would seem to be no doubt of the fact that the trustee, in his official capacity, is aggrieved thereby, and that it is his duty to vindicate his trust by taking such legal steps for that purpose as in the exercise of good faith seem reasonably necessary.

Passing to the merits of the case, we are confronted with a large mass of testimony upon which are founded the conclusions of the trial court that the testator had not testamentary capacity and made his will under undue influence. We have patiently and carefully read this testimony, and have reached the clear conclusion that neither finding is justified by the evidence. There is really no tangible fact in the evidence which shows that the testator lacked testamentary capacity. It is true that the contestants all testified, in general terms, that in their judgment their father was incapable of doing business or making a will, and it is also true that a number of disinterested witnesses testify to the same effect; but it cannot fairly be said that any witness testifies to a single solid, convincing fact which justifies such a conclusion. Nonexperts may give their opinions as to the soundness of a person's mind, when they have first shown such personal intercourse with the person in question as satisfies the court of their ability to give an intelli-

gent opinion. *Crawford v. Christian*, 102 Wis. 51; *In re Welch*, 108 Wis. 387. If, however, the acts and conversation of the supposed incompetent person, when detailed by the witness, show merely mental eccentricities, as distinguished from weakness of mind or delusions affecting testamentary capacity, it is very evident that the opinion of the witness that the person in question is or was incapable of making a will must have very little probative force. Testing the evidence before us by these principles, we can give very little weight to the opinions of the witnesses to the effect that William Butler did not have testamentary capacity when he executed the will in question. That he was an old man of irascible and violent temper is sufficiently shown. That his eye pained him greatly at times, increasing his irascibility, is certain. That the unfortunate family troubles which surrounded his later years made him frequently suspicious and violent is also certain. That he did not reason with entire justice to his children or his wife who were engaged in this controversy may be admitted. But all these things do not show incapacity to make a will. The actions which were relied upon by the witnesses to show incapacity were, principally, that he was changeable in his conversation; that he would get up nights, and wake up the family, and say somebody was around; that he sometimes took a stick and hammered on the fence; that he watched the actions of members of the family, sometimes dodging behind trees; that he showed no adequate concern at his wife's illness, saying that he was as sick as she was; that he threatened suicide; and that some days he acted kindly to his wife, and sometimes would not speak to her.

All of these eccentricities are easily explainable, and have little weight as tending to prove unsoundness of mind, when the terrible pain of the injured eye is considered, which frequently kept him awake nights, and when we also consider the discord in the family, in which all were involved, and

which proceeded to such lengths that the mother refused to see the sons.

There is practically an entire lack of evidence that the testator had any difficulty in remembering what his property consisted of, or where it was or what it was worth, or that he had any difficulty in remembering his relations to his children. On the contrary, there was very satisfactory evidence that two weeks before his death, while he was at James Butler's house, he talked freely of his property, and stated in detail all the property that he had on his home farm, enumerating the stock and grain, tools and vehicles, and placing values thereon which were all substantially accurate and correct. The evidence, also, that he had an accurate knowledge of his property, and communicated it to *Mr. Templeton* (a disinterested party) when he went to have his will drawn, is entirely satisfactory. The test is not whether the testator did the best or the wisest or the theoretically just thing in his will; but, Did he have sufficient active memory to collect in his mind and comprehend, without prompting, the condition of his property, his relations to his children and other persons who might properly be his beneficiaries, and the scope and bearing of his will, and to hold these things in his mind a sufficient length of time to perceive their obvious relations to each other, and be able to form some rational judgment in relation to them? *In re Lewis's Will*, 51 Wis. 101.

Applying this test to the present case, it may be said without hesitation that there is no tangible evidence in the case which throws even serious doubt upon the testator's ability to do all of these things at the time he executed his will.

Passing to the question of undue influence, there is even less testimony in support of this contention than in support of the contention of lack of capacity. It is clear that the testator was greatly embittered against those members of his family who justified the commencement of guardianship

proceedings, and that he made the will while feeling this bitterness; but he had not been under the influence of the parties who are benefited by the will, but, on the contrary, had been living with the Russells, who belonged to the other faction, up to the very time the directions for drawing the will were given to *Mr. Templeton.* The situation had not arisen when a presumption of undue influence arises, and, even if it had, still the clear and undisputed testimony of *Mr. Templeton*, showing the testator's independent action in the dictating of the terms of the will, in connection with the other facts in evidence showing that the will was the result of the testator's own determination, would be entirely sufficient to overcome the presumption.

Pages might be filled with detailed statements of the testimony of the various witnesses in this case, but it is not deemed either necessary or justifiable. It is sufficient to say that the entire testimony shows, without serious doubt, that the testator was entirely competent to make a will, and that his free agency was not destroyed or impaired by the influence of others, and hence that the decree of the county court admitting the will to probate should have been affirmed.

By the Court.—Judgment reversed, and action remanded to the circuit court with directions to affirm the judgment of the county court of Waukesha county.

On May 21, 1901, a motion by respondents to amend the judgment so as to direct costs of both parties to be paid out of the estate was denied.

110	80
110	[1]409
110	[2]410

110	80
111	[1] 64
111	[1]250
111	[2]302
111	[4]575

110	80
s58 LRA	603
56 LRA	544n
57 LRA	632n

110	80
115	[1]661
59 LRA	282

FULLER-WARREN COMPANY, Respondent, vs. HARTER, Appellant.

March 21—April 9, 1901.

Actions: Election of remedies: Sales of chattels: Fixtures: Preservation of chattel character: Rights of vendor and mortgagee.

1. The rule that a choice of one of two inconsistent remedies or causes of action waives the other, applies only where there are two such remedies or causes of action.
2. If a person pursues a cause of action which he erroneously supposes he has and is defeated because of the error, he is not precluded thereby from suing over upon the proper cause of action.
3. The vendor of personal property sold to be and in fact attached to real estate by the owner thereof or with his consent, as a permanent improvement, may by contract with such owner preserve the chattel character of the accession.
4. In the circumstances stated, the character of the accession cannot be preserved by contract between the vendor and vendee of the personalty as against the owner of a mortgage of the realty existing when the accession is made, who is not a party to such contract.
5. A contract between a vendor and vendee of personal property to be incorporated into the real estate of the latter as a permanent improvement thereof, such realty being incumbered by mortgage and the mortgagee not being a party to the contract, reserving the title to or any lesser interest in the subject of the sale after such improvement, for any purpose, is invalid as to the mortgagee.
6. Personal property annexed to mortgaged real estate which, as between mortgagor and mortgagee, becomes part of the mortgage security, becomes such as between the latter and a third person regardless of any contract between the former and such person and whether the removal thereof from the building can be effected without material injury thereto or to the value of the mortgage security as it existed prior to the accession.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Reversed.*

Action for a wrongful conversion of personal property. The trial was by the court. The findings were to the effect

that in 1894 plaintiff sold and delivered to Ann T. Shurts a No. 290 Fuller & Warren hot-air furnace and the necessary connections for use in heating her dwelling house, and caused the same to be set up therein under a contract guaranteeing the capacity thereof to heat such house to a specific temperature under specified conditions, and providing that, in the event of a failure so to do and notice thereof to plaintiff, it should have the option to make the plant do the work guaranteed or remove the same, plaintiff refunding any money that may have been paid thereon. Mrs. Shurts claimed that the property failed to fill the guaranty. She gave plaintiff notice thereof and that she would not accept or pay for the apparatus. Plaintiff then endeavored to remedy the alleged insufficiency, but failed, whereupon Mrs. Shurts refused to accept the apparatus and offered to return it. Plaintiff, claiming that the plant was as good as guaranteed, sued to recover the purchase price thereof and to enforce such recovery under the lien laws of the state because it was incorporated with and a part of the real estate on which it was located. Judgment was rendered in favor of Mrs. Shurts because the sale contract had been rightfully rescinded on the ground that the plant wholly failed to come up to the guaranty. When the plant was put in place there was a real-estate mortgage on the house. Before the final determination of the action against Mrs. Shurts such proceedings were duly taken to enforce such mortgage that defendant herein became the owner of the property as purchaser at the foreclosure sale, and is still such owner. The plant never became a part of the building in which it was located so but that it could be removed without material injury thereto. Seasonably after the decision aforesaid, plaintiff asserted its right to the plant as personal property, and before this action commenced demanded of defendant, who was then in possession of the real estate, the right to sever

such plant therefrom and remove it, which was refused. The value of the furnace and its connections is $180.

Upon such findings judgment was rendered in plaintiff's favor and defendant appealed.

For the appellant there was a brief by *Tullar & Lockney*, and oral argument by *D. S. Tullar*.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *C. F. Fawsett* and *J. G. Flanders*.

MARSHALL, J. The first point made by appellant, that is deemed sufficiently important to be worthy of consideration, is that plaintiff, having elected to sue upon the contract when a way was open to treat it as at an end and to take the property in controversy, was legally bound thereby, and that the trial court should have so held by dismissing this action. The rule is quite familiar that a person cannot have the benefit of two inconsistent remedies or causes of action; that when there are such, either of which will remedy the wrong against him, the choice of one forever waives the other. Many applications of that have been made by this court. *Warren v. Landry*, 74 Wis. 144; *Crook v. First Nat. Bank*, 83 Wis. 31; *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 547; *Carroll v. Fethers*, 102 Wis. 436. It was very recently quite thoroughly discussed in *Barth v. Loeffelholtz*, 108 Wis. 562. Does that rule apply where a person, supposing he has two causes of action for the satisfaction of his claim, when he in fact has but one, sues upon the supposed cause which has no existence, and is defeated on that ground? Is he under such circumstances precluded from suing upon the only cause of action which he in fact had? The proposition of appellant's counsel is that, because plaintiff sued upon the contract, supposing it had a cause of action thereon, and was defeated because the contract had been rightfully rescinded by defendant's predecessor, leav-

ing the subject thereof the property of respondent, it must nevertheless lose the same because another remedy is necessary to its recovery; that while it was defeated because the subject of the action was not the property of Mrs. Shurts, it is in any event powerless to claim the thing which, by the judgment of the court, it owns. That seems to be unreasonable. If the doctrine as to the effect of an election between two inconsistent causes of action goes that far, it is certainly liable to cause great injustice in some cases. That, of itself, without investigation, suggests that it does not go that far. We should hesitate to sustain counsel's theory if the question involved was new, but it is not.

The same seemingly unreasonable application of the rule, as regards the effects of an election between inconsistent remedies, as that contended for here, has been several times insisted upon in other courts, as appears from reported cases, and always unsuccessfully. In *Morris v. Rexford*, 18 N. Y. 552, the circumstances were that plaintiff sold a quantity of oats to the defendant, payment therefor to be made on delivery. The delivery was made but the purchase price was not paid. After some delay the plaintiff endeavored to rescind the sale contract and brought replevin. Subsequently he sued for the purchase price of the oats. On the trial it did not appear that recovery was had in the replevin action or what had become of the same. The court held that the mere commencement of the replevin action did not necessarily preclude plaintiff from prosecuting the action on the sale contract; that whether there was an election of remedies within the meaning of the rule on that subject depended upon whether the plaintiff had in fact two remedies; that if he had but one, the pursuit of one that he did not possess would not bar him from subsequently resorting to the one which he did possess. In *Kinney v. Kiernan*, 49 N. Y. 164, the court stated the rule in these words: "The institution by a party of a fruitless action, which he has not the right

to maintain, will not preclude him from asserting the rights he really possesses." In *McNutt v. Hilkins*, 80 Hun, 235, the decision was based on that in the preceding case cited. The rule declared substantially fits the exact facts of this case. The syllabus states it briefly as follows:

"An action brought for the conversion of personal property, wherein it was successfully maintained by the defendant that the title to the personal property alleged to have been converted was in him and in which judgment was rendered in his favor is not a bar to a subsequent action between the same parties brought to recover damages for breach of the contract of the sale of such property."

In reaching such conclusion the court used the following language as to the contention of the losing party:

"The defendants, by their contention, succeeded in establishing that there had been an absolute sale, and that, therefore, the plaintiff had mistaken her remedy, and they cannot now set up the judgment which they then obtained to prevent the plaintiff recovering the purchase price of the property which they formerly urged and established was sold to them by her, and which it is conceded they have not paid for, and thus not only retain the property, but also the purchase price."

To the same effect are *In re Van Norman*, 41 Minn. 494; *Gould v. Blodgett*, 61 N. H. 115.

In applying the rule as regards the effect of a choice between two inconsistent remedies or causes of action, it must be kept in mind that there must be two such remedies or causes of action, in fact, before a choice can be made within the meaning of the rule. A misconception of remedies should not be mistaken for an election between inconsistent remedies. Here there was no remedy upon the contract. Mrs. Shurts recovered of plaintiff upon that ground. Such recovery effectively answers the suggestion that the resort to the supposed remedy stands in the way of insisting upon the only remedy plaintiff had. Not only is plaintiff not bound as having made an election of one of two inconsist-

ent remedies, but Mrs. Shurts, and appellant claiming under her, are estopped by the former judgment from asserting to the contrary or that the property in dispute was not the property of respondent, at least as between it and Mrs. Shurts, and as between it and the appellant unless the fact be otherwise because as against him the heating plant became a part of the real estate and passed to him under the foreclosure sale.

So, as between Mrs. Shurts and respondent, the heating plant is personal property, notwithstanding its physical annexation to the building it was designed to heat. The plant was not simply set up in Mrs. Shurts's building on trial. It was actually sold and delivered to her and placed in her building to remain there as an improvement thereof, subject to the guaranty of its efficiency. The parties were competent to preserve its character as personalty, between themselves. That does not admit of a question. *Smith v. Waggoner*, 50 Wis. 155; *Fitzgerald v. Anderson*, 81 Wis. 341; *Keefe v. Furlong*, 96 Wis. 219. They accomplished that, though the relations of vendor and vendee between them were not severed by resorting to the contract in that regard, but by the use by Mrs. Shurts of her remedy for the breach of warranty.

Did the heating plant become a fixture as to the mortgagee? That is the important question. That there was an intent on the part of respondent and Mrs. Shurts that it should be incorporated into and made a part of the building, subject to the right of the former to reclaim the same in case of inability to make the apparatus do the work guaranteed, is unquestioned. As before indicated, the contract of sale contemplated physical annexation of the plant to and incorporation of it with the building it was designed to heat as a permanent improvement thereof, reserving the right to remove it as a mere security against losing the property as well as the pay for it if it failed to satisfy the war-

ranty. All the essentials to change the chattel character of the property to real estate were satisfied, viz.: physical annexation of one to the other, adaptation of the improvement to the use to which the realty was devoted, and intent of the person causing the annexation to make a permanent improvement of the freehold. Tyler, Fixtures, 114; *Gunderson v. Swarthout*, 104 Wis. 186. The relations between the parties after the plant was set up were substantially the same as they would have been had respondent sold it under an agreement that the title thereto should not pass to the vendee till it was paid for, and if payment was not made respondent should have the right to remove it from the building, doing no more injury thereto than necessary. Counsel for appellant claim that personal property incorporated into mortgaged realty under such circumstances, and without the mortgagee being a party to the transaction, becomes a part of the mortgage security, and cite many authorities to support that view. Counsel for respondent claim that in such circumstances, where the accession can be severed from the realty without injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, the same character is impressed upon the accession as between the vendor and the mortgagee as between the vendor and mortgagor; in other words, that it does not become real estate, and may be severed from the realty and removed without invading the rights of the mortgagee. The learned trial court so held and there is ample authority to support that view, to some of which counsel for respondent have referred us. The difficulty is that there are two well-defined doctrines on the subject, one being directly opposed to the other. In many jurisdictions the doctrine contended for by appellant's counsel prevails, and in many others that contended for by respondent's counsel prevails. The former view is maintained by the following of the numerous authorities that might

be cited: *Miller v. Wilson*, 71 Iowa, 610; *Clary v. Owen*, 15 Gray, 522; *Pierce v. George*, 108 Mass. 78; *Smith P. Co. v. Servin*, 130 Mass. 511; *Southbridge S. Bank v. Mason*, 147 Mass. 500; *Meagher v. Hayes*, 152 Mass. 228; *Watertown S. E. Co. v. Davis*, 5 Houst. 192; *Hawkins v. Hersey*, 86 Me. 394; *McFadden v. Allen*, 134 N. Y. 489. The latter view is as firmly maintained by the following of many authorities that might be mentioned: *Campbell v. Roddy*, 44 N. J. Eq. 244; *Binkley v. Forkner*, 117 Ind. 185; *Hill v. Sewald*, 53 Pa. St. 271; *Crippen v. Morrison*, 13 Mich. 23; *Belvin v. Raleigh P. Co.* 123 N. C. 138; *German S. & L. Soc. v. Weber*, 16 Wash. 95; *Northwestern M. L. Ins. Co. v. George*, 77 Minn. 319.

In *Clary v. Owen*, 15 Gray, 522, the Massachusetts court, speaking by Mr. Justice HOAR, said:

"We think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty."

In *Meagher v. Hayes*, 152 Mass. 228, the same court said that a building put on mortgaged land and annexed to it in the usual way, without the mortgagee being a party to the transaction, became a part of the mortgage security notwithstanding an agreement between the owner of the building and the mortgagor that it should remain personal property with the right of such owner to remove it, and that the purchaser of the land at the foreclosure sale became the owner of such building, though he bought with notice of such agreement. In *Hawkins v. Hersey*, 86 Me. 394, the supreme court of Maine, speaking by Mr. Justice WHITEHOUSE, said:

"When machinery is sold and placed in a building for the purpose of making it available as a manufactory and permanently increasing its value for occupation, an agreement

between the seller and buyer that the title shall remain in the former until it is wholly paid for, will not bind or affect the mortgagee of the realty without notice, and such machinery will pass to the mortgagee as a part of the realty."

On the other hand, in *German S. & L. Soc. v. Weber*, 16 Wash. 95, the supreme court of Washington said that material sold and used in the construction of a building located upon mortgaged real estate, under an agreement with the mortgagor that the seller shall retain the title to such material till paid for, with the right to remove the same in case of nonpayment, does not become a part of the building and realty so that the mortgage lien will attach thereto as against the seller, if such material can be removed from the building without injury thereto. Similar language was used by the Minnesota court in *Northwestern M. L. Ins. Co. v. George*, 77 Minn. 319, where it was held that an apparatus, which formed a necessary part of a cold-storage plant and was attached to the storage building subsequent to the execution of a mortgage thereon, under an agreement between the vendor of the apparatus and the mortgagor that the former should retain the title thereto till it should be paid for, and have the right to remove the same in case of default, did not become a part of the mortgaged realty, but remained personal property during the existence of the condition, as against both mortgagor and mortgagee, since its removal from the building to which it was attached was shown to be practical without injuring such building or the value of the mortgage security as it existed before the apparatus was placed therein. The other cases cited to that doctrine are to the same effect. Probably the leading case on the subject is *Campbell v. Roddy*, 44 N. J. Eq. 244, where the two doctrines are discussed at great length.

The rule that a contract between a mortgagor of real estate and his vendor of chattels, to be and which are actually wrought into such real estate as an improvement thereof,

will preserve the chattel character of the accession, does not militate against the mortgage attaching thereto as a part of the security if the mortgagee is not a party to such agreement, is referred, for its original support in this country, most generally to the supreme court of Massachusetts, and it is sometimes called the Massachusetts rule. If it applies to this case, the finding that it is practicable to remove the heating plant from the appellant's building is immaterial, and the judgment appealed from is wrong.

It seems that this court adopted the so-called Massachusetts rule at a very early day, in *Frankland v. Moulton*, 5 Wis. 1, where the opinion was delivered by Chief Justice WHITON, citing *Winslow v. Merchants Ins. Co.* 4 Met. 306; *Corliss v. McLagin*, 29 Me. 115; and *Butler v. Page*, 7 Met. 40. The circumstances in the *Frankland Case* were that machinery was sold to the owner of the real property while it was incumbered by an equitable mortgage, to be attached to such realty as an improvement thereof, the vendor of the machinery retaining a chattel-mortgage interest therein to secure the payment of the purchase money. It was held that the chattel mortgage was wholly inoperative as against the holder of the equitable mortgage; that the agreement between the chattel mortgagee and mortgagor, preserving the chattel character of the machinery after it was physically attached to and had become an appropriate improvement of the building in which it was located, was effective only between the parties to such mortgage. In *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150, a chattel mortgage was taken, by the vendor of a heating plant set up in a building, to secure the purchase money of such plant, and it was held that the chattel mortgage was not effective to preserve the chattel character of the heating plant as against prior lien claims upon the property. The very opposite was held in *Campbell v. Roddy*, 44 N. J. Eq. 244, the leading New Jersey case to which we have referred, where several Massa-

chusetts cases that have received the approval of this court were reviewed and rejected as unsound. *Frankland v. Moulton*, in principle, covers the whole subject under discussion. It does not appear ever to have been criticised here since it was decided, but has been repeatedly approved as stating the true rule. *Smith v. Waggoner*, 50 Wis. 155; *Taylor v. Collins*, 51 Wis. 123; *Kendall Mfg. Co. v. Rundle, supra*; *Homestead L. Co. v. Becker*, 96 Wis. 206; *Gunderson v. Swarthout*, 104 Wis. 186.

The judicial policy of this state having been established for nearly half a century, as indicated, it is considered that we are not permitted to question it now. The opposite doctrine may be the most equitable. It is probably supported by the greater weight of authority if that is to be determined by the number of decisions. Possibly it may be by the better reasoning, though the indications, it is believed, from a study of the numerous cases that have dealt with the subject in recent years, are that it has been losing rather than gaining ground. The tendency of courts is to fence it within as narrow limits as practicable. For example, in *McFadden v. Allen*, 134 N. Y. 489, decided in 1892, the Massachusetts rule, so called, was adopted in its entirety, with the possible exception of where an interest in the accession to realty is reserved as security for purchase money. In all other cases it was distinctly said that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate as an improvement thereof during the life of the mortgage thereon, is ineffective as against the mortgagee unless he is a party to the transaction; and that the question of whether it can or cannot be removed without injury to the realty is immaterial. What reason there is for saying that a contract between a vendor of chattels and a mortgagor of real estate, in regard to the character of the former after being incorporated into the latter, shall be binding on the mort-

gagee in one case and not in another, when the mortgagor is left in the same position, without the benefit of the accession to the realty, in one case as in the other, is not easily perceived. *McFadden v. Allen* seems to limit or overrule some early New York cases cited by the New Jersey court as supporting authorities. The general rule stated in the New York court is in perfect harmony with the holdings of the Massachusetts court. It is as follows:

"The lien of the mortgagee covers all that was realty when he accepted the security, and all accessions to the realty except when, by a valid agreement to which he is a party, the character of chattels is impressed upon them."

The invalidity of a contract between a mortgagor of realty and his vendor of chattels to be annexed and which are annexed to the mortgaged property, preserving the chattel character of the accessions, has been recently repeatedly maintained by the federal courts. *Phœnix I. W. Co. v. New York S. & T. Co.* 83 Fed. Rep. 757; *Porter v. Pittsburg B. S. Co.* 120 U. S. 649; *S. C.* 122 U. S. 283.

In a New Jersey case decided in 1898,— *General E. Co. v. Transit E. Co.* 57 N. J. Eq. 460,— a conclusion was reached contrary to that of the federal supreme court in the case last above cited, such court's decision being vigorously attacked as promulgating an unsound doctrine. The difficulty is that the judicial policy of the federal court, indicated in the several cases cited, and the other courts that are in harmony therewith, is one way, while that of the New Jersey court and others in harmony with its policy is the other. Each court having adopted a policy for its jurisdiction, for it that policy is the proper one and the opposite policy is unsound. An expression in *Phœnix I. W. Co. v. New York S. & T. Co.* may be cited as indicating clearly that, where the doctrine prevails that the vendor of chattels to be attached to real estate cannot control their character after the accession is made, as against the mortgagee of the realty,

by a contract with the mortgagor, the question of whether such accession can be severed from the realty without injury thereto is of no significance. CLARK, district judge, in delivering the opinion of the court of appeals, said: "The determination of the case does not depend on any narrow question of mere physical injury to the building in the removal of the machinery placed therein."

Walker v. Grand Rapids F. M. Co. 70 Wis. 92, is cited to our attention by respondent's counsel with confidence, but we think it has no application to the facts of this case. There an apparatus for a gristmill was consigned by the manufacturer to a contractor who was engaged in building over the mill for the owner, with permission to set it up for trial. There was no sale, conditional or otherwise. The owner of the apparatus did not part with the title or have any intention of adding the apparatus to the mill as a permanent improvement thereof, conditional or otherwise. If there had been no sale of the heating plant in question, conditional or otherwise, but a mere permission obtained of Mrs. Shurts to set it up in her house and test it, there would be some analogy between this case and *Walker v. Grand Rapids F. M. Co.* Whether it could be removed under such circumstances might depend upon whether the removal would materially injure the building to which it was attached. The trouble is that it was actually sold and delivered to Mrs. Shurts. The title thereto passed to her. She afterwards divested herself of the title as between herself and respondent, by rescinding the sale contract for breach of warranty, as before indicated.

There appears to be no legitimate way open to us to decide otherwise than that the trial court adopted the wrong doctrine in reaching a conclusion in this case. It was made to turn upon two facts: first, the heating plant is personal property as between the mortgagor and respondent because of the contract between them; second, it is of the same char-

acter as regards appellant claiming under the mortgage, because it can be removed without any material injury to the realty. Those facts are entirely immaterial, since the title to the heating plant was vested in Mrs. Shurts and set up in her building as a permanent improvement thereof, subject to the contract right reserved to remove it, as a mere security against loss thereof to the vendor in case it failed to satisfy the warranty. The intention that the plant should actually be incorporated into the realty, regardless of the conditional right reserved, satisfied the element of intent necessary to make the plant realty as between the vendor thereof and the mortgagee of such realty. As soon as the accession to the realty took place, the mortgage lien attached thereto and could not thereafter be removed without either payment of the mortgage or the mortgagee's consent. The rule stated in *Homestead L. Co. v. Becker*, 96 Wis. 206, applies. There being no intention to remove the chattel when it was attached to the realty, it passed to appellant under the mortgage, who acquired title by the foreclosure thereof, and this although it was capable of being removed without injury to the building. Mr. Justice PINNEY, in so stating the rule, cited in support thereof *Frankland v. Moulton*, 5 Wis. 1, and one of the leading Massachusetts cases.

By the Court.— The judgment is reversed, and the cause remanded with directions to render judgment in defendant's favor for costs.

CITY OF ASHLAND, Petitioner, vs. ASHLAND WATER COMPANY, Respondent.

March 22 — April 9, 1901.

Corporations: Franchises: Forfeiture: Leave to commence action: Sufficiency of petition.

1. Permission to commence an action to forfeit the franchises of a corporation should not be granted on a mere petition stating grounds on information and belief, where the petition is met by an answer putting in issue all the material allegations thereof, verified upon the knowledge of the person making it, and supported by affidavits of persons competent to testify as witnesses positively denying the material facts alleged.
2. The provision of sec. 3241, Stats. 1898, that "upon cause shown" an action may be brought by the attorney general or any private party in the name of the state, on leave granted by the supreme court, to vacate the charter or annul the existence of any corporation which shall misconduct itself in any of the ways enumerated, requires that the petitioner shall satisfy the court that he has at hand evidence sufficient, if unopposed, to justify the forfeiture.

APPLICATION for leave to bring an action to forfeit the franchise of the *Ashland Water Company*. *Denied.*

Application for leave to commence an action in circuit court to forfeit the franchise of the *Ashland Water Company*, under which, since about 1884, a system of waterworks has been maintained to supply water for public and private purposes in the territory included within the city of *Ashland*. The following, among other matters, are alleged in the petition on information and belief: The franchise was granted in 1884 to individuals. It was thereafter amended in some particulars, and in 1887 was in form confirmed by the common council of said city, for the term of fifty years, to the *Ashland Water Company*, the then owner thereof. Two members of the council were stockholders in the water company, and voted for the confirmatory ordinance contrary to the city charter, and their votes were

necessary to its passage. Complaints were made about the condition of the water furnished by the company in and prior to 1895. The bad condition of the water resulted in an action being commenced to forfeit its franchise for abuse thereof. An agreement was made for the discontinuance of the action and settlement of all differences between the company and the city on condition, among other things, that the company should immediately commence extending or improving its system so as to furnish an adequate supply of pure water, and prosecute the work in that regard to effect as expeditiously as possible, the city having the right to enter upon and examine the waterworks property at any time and place for the purpose of investigating the condition of the water supply. Pursuant thereto the company constructed a filtration system which so improved the quality of the water that the proceedings to forfeit the franchise were dropped. The company failed, however, to continue to furnish the city with an adequate supply of pure water. In 1890 it opened a suction pipe in Chequamegon Bay, its source of water supply, at a point where the bay water was so contaminated with sewage from the sewage system of the city of *Ashland*, that impure water, containing disease germs, was pumped into the water mains and distributed to the customers of the company without the water passing through the filtering process. From that time to the present there has been an epidemic of typhoid fever in said city, traceable to the use of impure water allowed to enter the water mains of the water company in the manner stated, or not purified in the filtering process because the filtering system was not kept in a proper condition to do its work. Such system should be renovated at least once each week, but the water company has failed to give such attention thereto for upwards of six months. The company's franchise requires it to extend its pipe system when so ordered by the common council, which it has refused to do. Two instances are specified.

The petition is quite lengthy, but what has been stated contains the substance of the allegations of wrongdoing as a basis for vacating the waterworks franchise. It was signed by the city attorney, verified by him on information and belief, and contained an allegation to the effect that it was made by direction of the city council. There were no supporting affidavits.

The application was opposed by a verified answer putting in issue all the material allegations of the petition as to wrongdoing on the part of the water company. The verification was upon the knowledge of the person making it. The answer was supported by numerous affidavits made by persons competent to testify to the facts as witnesses. Such affidavits are to the effect that all the water furnished by the water company since the installation of the filtering plant has been taken from artesian wells or from Chequamegon bay, the bay water being all passed through the filtering plant before being distributed for consumption; that the plant has at all times since it was constructed been kept in a suitable condition to do the work it was designed to do; that it was constructed at a cost of some $40,000 and is the kind recommended by sanitary experts as best suited to free water from deleterious substances; that the only intake pipe in the bay by which water was formerly pumped therefrom directly into the water mains was sealed up by the city authorities in 1896, and has never since been opened; that there is no opening in the supply pipes by which water can be taken from the bay and pumped into the water mains without being passed through the filtering plant; that the plant has been operated and taken care of from the first in precisely the same way and in the manner best calculated to secure the best attainable results; that since the present system of furnishing pure water was installed, covering a period of some five years, there have been no cases of typhoid fever in *Ashland* except those brought into the

city from the outside; that the reason why the company refused to make the extensions mentioned in the petition was that the city was indebted beyond the constitutional limit, and further because, in one case, the common council, without any right so to do, dictated the size of water pipe to be used in making the extension, and imposed a penalty on the company for not complying with its demands; and in the other case the extension was ordered to be made upon private property.

E. F. Gleason, for the application.

W. M. Tomkins and *C. A. Lamoreux*, *contra*.

[No briefs on file.]

MARSHALL, J. This application is ruled against the applicant by *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496. It was there held, in effect, that permission to commence an action to forfeit a franchise should not be granted on a mere petition stating grounds therefor on information and belief, where it is met by affidavits of persons competent to testify as witnesses, positively denying the material facts alleged. It was supposed that the decision then rendered would so guide the attorney general in deciding whether to allow the use of his name as relator that applications of the kind before us would not reach this court by his permission without a fair *prima facie* case being stated in the moving papers, by positive allegations of wrongdoing in the petition or by supporting affidavits of persons competent to testify to the facts stated therein, or by both. When the legislature lodged power here to say "upon cause shown" (sec. 3241, Stats. 1898) when an action may be brought to forfeit a franchise, the intent was that such power should be exercised in each case with all the care requisite to the proper decision of a judicial question. As said in *State ex rel. Att'y Gen. v. Janesville W. Co.*, to merely examine the petition and grant it regardless of op-

posing affidavits, because, if all the allegations thereof, whether upon information and belief or upon the knowledge of the petitioner, are true, it states a *prima facie* case, would be a failure to exercise that sound judicial discretion which the law contemplates, amounting to an abuse of judicial duty. It was foreseen by the legislature, we must assume, that much mischief might be done to public and private interests by the commencement of such actions without any legitimate ground therefor; and the peril in that regard was guarded against as far as practicable by requiring that this court shall be satisfied that a cause for judicial investigation exists, of such moment, as regards public interests, that some appropriate jurisdiction should be set in motion to that end, before the state's grantee of a franchise, or his assignee, shall be called into court to defend against a charge that he has been guilty of a wilful misuse or abuse thereof. A mere petition, containing complaints on information and belief, especially when opposed by affidavits denying all the alleged wrongdoing, comes far short of satisfying the spirit of the statute. The petition ought in any case to be upon the knowledge of the petitioner, or be supported by affidavits of persons having knowledge of the facts. Such support is indispensable where all the material allegations of the petition are positively denied by the affidavits of persons competent to testify as witnesses to the facts.

It should be understood that the legislative intent, as judicially declared in *State ex rel. Att'y Gen. v. Janesville W. Co.* and here affirmed, does not call for a preliminary trial of an alleged cause of action to forfeit a franchise, on affidavits, at the time of the application being heard in this court for leave to commence an action for that purpose. It requires, at such time, as a condition of the application being granted, that "cause be shown" within the letter and spirit of the statute; that is, that the petitioner shall satisfy the

court that he has at hand evidence sufficient, if unopposed, to justify the forfeiture. If it is true, as alleged, that the *Ashland Water Company* has for several months been furnishing its customers with water polluted with city sewage and disease germs, no reason is perceived why evidence thereof, in the form of affidavits, was not made a part of the application before us. The moving party, if the leave asked for were granted, could not make it available without proof of facts justifying the forfeiture. Without such proof being first produced, the water company would not have to accept the challenge of its rights and become an actor in the matter. Why, then, should leave to commence such action be granted, in the absence of any showing that the petitioner is in possession of evidence of the facts alleged, especially in the face of positive evidence that such alleged facts do not exist? How can a court say in such a situation that cause for the commencement of the action is shown.

It is said in the petition that an opening was made in 1900 in the intake pipe, so that bay water has since that time been pumped directly into the water mains. A charge of that kind is very serious, in view of the notorious and apparently well-recognized fact that the bay water, before passing through some filtering system, is unwholesome, and the fact that an action instituted in 1895, to forfeit the water company's franchise, was discontinued upon its installing a satisfactory filtering system and giving satisfactory assurance that the purity of the water would be thereafter maintained. It is easy to make such a charge on information and belief and there not be in existence a scintilla of known evidence to substantiate it. Such a charge should not be made, as a basis for judicial action of the kind requested, before there is competent evidence in hand tending to establish it. If the water company has been guilty of knowingly pumping polluted bay water into its water mains after securing immunity from a prosecution to forfeit its franchise, by constructing an

approved filtering system designed to free from impurities all the bay water distributed to its customers, with the understanding that it should be maintained and operated to accomplish that result, a forfeiture of its franchise would be a light punishment for the offense. But the value of such franchise and the property interests involved should not be imperiled by charges of that nature, recognized by an order, based upon a probability that they may be true, for a judicial investigation, in advance of the procurement of some credible evidence to establish them and the presentation thereof in the form of affidavits to this court, where the allegations in that regard are denied in the manner before indicated. A presentation of this kind, to warrant judicial action favorable thereto, should appear to be made in good faith, show that evidence is obtainable to establish the facts relied upon, that such facts plainly indicate some wilful misuse of the franchise defeating the very design of its creation, that a forfeiture, under the circumstances, will not be inequitable, and that the grievances complained of will be thereby, at least in some substantial degree, remedied. The forfeiture of a franchise is a severe remedy. It is in a civil action what capital punishment is in the criminal law. Courts proceed with great caution in such matters, not regarding a forfeiture justifiable except in a plain case of wilful misuse or abuse of the public privilege going to the very groundwork of the grant, and where no other punishment will adequately remedy the mischief. *State ex rel. Prosecuting Att'y v. Commercial Bank*, 10 Ohio, 535; High, Extr. Leg. Rem. § 649.

On the record before us the question of whether leave ought to be granted to challenge the right of the water company to continue to exercise the franchise in question is fully covered by the *Janesville Case*, 92 Wis. 496. On one side are mere charges, on information and belief, easy to make, without any known evidence to support them in a court of justice. On the other is a number of affidavits of persons competent

to testify as witnesses on a trial of the controversy involved. If the unfortunate condition said to exist in the city of *Ashland* is, as alleged, traceable to wilful conduct of the water company in distributing impure water to its customers, there should be relief as speedy and ample as the judicial power of the state can furnish. But before machinery should be set in motion to oust the water company of its franchise and wind up its affairs, which means confiscation of its property in whole or in part, the prosecutor should be able to show that he is in possession of evidence reasonably sufficient to justify it. If such an investigation shall be entered upon, as a well-grounded suspicion, even, that the allegations of the petition are true demands at the hands of the public authorities of *Ashland*, and it be prosecuted with the system and skill that should be devoted to a matter of such grave importance, facts can soon be uncovered, if they exist, which, when properly testified to on an application to this court for the use of a proper jurisdiction to forfeit the water franchise, will receive favorable consideration. The present application is clearly insufficient and must be denied.

By the Court.— So ordered.

WINCHELL, Respondent, vs. THE CITY OF WAUKESHA, Appellant.

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March 22 — April 9, 1901.

Municipal corporations: Liability for nuisance: Sewer system: Navigable stream: Pollution: Riparian rights: Private injury: Injunction: Implied authority to create or maintain a nuisance: Police power: Remedies: Evidence: Pleading: Inferior courts: Jurisdiction: Judgment: Modification.

1. Defendant built a sewer system with an outlet into a navigable river about a quarter of a mile above plaintiff's farm, her house being 850 feet from the river. As the volume of sewage increased defile-

ment of the waters became apparent, and an extremely offensive, disagreeable odor therefrom pervaded plaintiff's residence, causing great distress, discomfort, and illness. The waters of the river were thereby rendered unfit for bathing or for watering stock, and were only about double in volume the amount of sewage flowing into it. The volume of the stream was decreasing and that of the sewage increasing. Experts testified that at an expense of about $5,000 the sewage could be purified and rendered innoxious and inoffensive. *Held*, an obvious nuisance, which, if created and maintained by an individual, would entitle plaintiff to the aid of a court of equity to effect its abatement, and to damages if pecuniary injury was established.

2. The injuries to plaintiff, in substantial defilement of the waters, preventing their beneficial use and impairing the use of her land itself, are none the less special and private because by the same acts may be created and maintained a public nuisance in defiling the waters of a navigable stream, or in polluting the atmosphere to the detriment of the public health.

3. A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual.

4. How far there must be a yielding of the private rights of continual purity of such lakes and rivers as are the natural and unavoidable courses and receptacles of drainage, to the necessity of use thereof for the public and general health and convenience, and upon what terms such yielding shall come, are primarily questions of policy for the legislature, within the limits of its power over private rights defined by the constitution.

5. An act of the legislature authorizing a city to construct a sewage system does not give the city, by inference or implication, authority to pollute the waters of a navigable stream and thereby, either from the plan adopted or negligence in management, create a public nuisance to the detriment of the rights of a riparian owner.

6. In an action by a riparian owner to enjoin a city from emptying its sewage into a navigable stream, where there is no issue of negligence either in construction or management of its sewers, the effect of the remedy by injunction upon the defendant is an important consideration in determining whether the court should apply such relief or leave plaintiff to her legal remedies, and, in that respect, evidence that the sewage could be deodorized and rendered innoxious at small expense is admissible.

7. A complaint to restrain a nuisance alleged facts showing fully irreparable injury, and that the same was continuously and constantly recurring, and that any remedy obtainable in a court of law would

be inadequate. *Held*, that such complaint warrants equitable relief under sec. 3180, Stats. 1898, even though it fails to allege *in hæc verba* any of the conditions prescribed by the statute.

8. The jurisdiction, in civil actions, of the county court of Waukesha county is limited to $25,000. In an action to abate a nuisance it appeared that the value of plaintiff's land was $10,000; that the damages claimed were $6,000, and that the nuisance could be abated by appliances costing about $5,000. *Held*, that there was nothing in the record, on any theory of the value or amount in controversy, to support a contention that the jurisdictional limit was transcended.

9. Where the trial court found that until December, 1901, would be a reasonable time to allow defendant to change its sewer system, in order to remove any ambiguity in the judgment restraining the defendant, after December, 1901, from continuing to empty its sewage into the river in such condition and manner as to create a nuisance to the plaintiff, it was modified on appeal by adding, "unless the same shall have first been so deodorized and purified as not to contain foul, offensive, or noxious matter capable of injuring the plaintiff or her property or causing nuisance thereto."

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Modified and affirmed.*

The plaintiff, a married woman having a family, is the owner of a farm of about 115 acres, south of *Waukesha*, bounded on the northwest and west by a small, shallow, and sluggish stream called Fox river, which runs through the city of *Waukesha*, and is the only natural drainage course therefrom. On this farm, about 850 feet east of the river, is the residence of herself and family. About ten years ago the city of *Waukesha* installed a sewer system, now aggregating about fourteen miles, the whole of which empties at one point into said Fox river about a quarter of a mile north of plaintiff's land. The number of connections with said sewer system has been continually increasing since its installation, so that now there are about 550 closets connected therewith, in addition to the sewer of the State Industrial School for Boys. Prior to the construction of the sewer, the waters of Fox river were reasonably clear, suit-

able for bathing and for the watering of stock. As the volume of sewage increased, defilement of these waters began to be apparent, so that beginning some five or six years before the commencement of the suit they became offensive to the smell, and from them arose an extremely disagreeable odor or stench, which, whenever the wind was westerly, and especially in warm weather and stagnant conditions of atmosphere, pervaded the plaintiff's residence, causing great distress and discomfort, and in some cases illness. The waters were further rendered unfit for bathing or for watering stock. It appeared that the flow of water in the river is only about double the amount of sewage water flowing into it; that shortly below the mouth of the sewer were what are described as pockets, or deep places in the river, into which a large percentage of the sewage solids are accustomed to settle and remain during the process of decomposition. It also appeared that the volume of water flowing through the stream is tending to decrease from year to year, and that the use of the sewerage system is upon the increase. Plaintiff was the owner of the farm at the time the construction of the sewer was commenced, but is not shown to have had any knowledge of the details of that system, or where it was to empty, nor of the probable effect upon the waters of the stream. It was also made to appear that at an expense of some $5,000 there could be installed septic beds or tanks whereby the sewage could be purified and rendered innoxious and inoffensive. The present suit was brought to abate and enjoin the maintenance of this sewer as a nuisance, and to recover damages caused to the plaintiff's premises thereby, it being alleged that they were greatly deteriorated in sale value. The trial court, after finding facts substantially as above recited, and that until December 1, 1901, is a reasonable time to allow the defendant city to change its sewage system and provide for the doing away with the nuisance to the plaintiff, declared

its conclusion of law "that the defendant should be restrained from continuing such nuisance, and from further emptying or depositing its sewage into said Fox river in such a condition and manner as to create the nuisance to the plaintiff, and that said injunction take effect December 1, A. D. 1901," whereupon an interlocutory judgment was entered restraining the city "from discharging its sewage through its sewer system into the Fox river at any time after the 1st day of December, A. D. 1901," and further directing that the question of plaintiff's damages be determined by a jury trial at the next regular term of court. From such interlocutory judgment this appeal is brought.

For the appellant there were briefs by *H. J. Frame*, city attorney, and *Ryan & Merton*, of counsel, and oral argument by *E. Merton*. To the point that the city authorities, when they were doing the work of constructing a sewage system authorized by subd. 11, sec. 893, R. S. 1878, by the village organization, and by sec. 925–208, Stats. 1898, by the city organization, acted in a judicial or *quasi*-judicial capacity in determining where the sewers shall discharge, and that when, in the exercise of their discretion, the sewers were made to discharge into a stream, the city is under no common-law liability for incidental damages, they cited *Atwood v. Bangor*, 83 Me. 582; *Merrifield v. Worcester*, 110 Mass. 216; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458; *McBean v. Fresno*, 31 L. R. A. 794, 796; *Coldwater v. Tucker*, 36 Mich. 474; *Valparaiso v. Hagen*, 48 L. R. A. 707; *Platt Bros. & Co. v. Waterbury*, 48 L. R. A. 691; *Gray ex rel. Simons v. Paterson*, 48 L. R. A. 717; *Sayre v. Newark*, 48 L. R. A. 722.

For the respondent there was a brief by *Armin & Waite*, and oral argument by *C. E. Armin*.

DODGE, J. The findings and evidence disclose a very obvious nuisance, which, if created and maintained by an indi-

vidual, would entitle the plaintiff to the aid of a court of equity to effect its abatement, and to damages if pecuniary injury be established, within the decisions of this court which are cited and summarized in *Middlestadt v. Waupaca S. & P. Co.* 93 Wis. 1, 4. Two entirely well recognized elements of special and private injury are established, namely, substantial defilement of the waters of a stream flowing along and over plaintiff's land so as to prevent the beneficial use of the water, and so as to injure and impair the use of the land itself; also for the creation of noisome and noxious odors interfering with the comfort, convenience, and probably the health of plaintiff and her family in the occupation of her habitation. These injuries to the plaintiff in the use of her property and to the property itself are none the less special and private because by the same acts may be created and maintained a public nuisance in defiling the waters of a navigable stream, or in polluting the atmosphere to the detriment of the public health. It has been declared by this court in *Harper v. Milwaukee*, 30 Wis. 365, 372, that "the general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible in any case in which, under like circumstances, an action could be maintained against an individual." Again, in *Hughes v. Fond du Lac*, 73 Wis. 380, 383, it is said, "A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual." These statements are very broad, and, appellant insists, must yield to various exceptions and limitations. Certain decisions elsewhere are urged upon our attention, notably, *Pennsylvania C. Co. v. Sanderson*, 113 Pa. St. 126, and *Valparaiso v. Hagen*, 153 Ind. 337; *S. C.* 48 L. R. A. 707. The logic of the line of decisions illustrated by the latter case may be

summarized as follows: The collection and disposal of sewage is for the public safety. Cities therein are performing a governmental function for the general public, not a merely corporate power. The use of streams for such public purpose is within the right of the state government. No constitutional obstacle exists unless private property is actually taken. Impairment of use of running water or of the atmosphere is mere indirect and consequential damage, and does not amount to a taking of any property. The general authority to municipalities to construct sewer systems is a direct legislative authority to use the natural drainage courses, since in no other manner can the outflow be dismissed. Hence, no liability being expressly imposed, none results from the use of the water courses for such purpose, in absence of negligence. Some of the propositions in this chain of reasoning have received apparent approval in our own decisions. It has been said that garbage and sewage disposal is the performance of a governmental function for the general public (*Kuehn v. Milwaukee*, 92 Wis. 263); also that more limited rules of liability apply in the exercise of such function than of more distinctively municipal or corporate powers (*Kuehn v. Milwaukee, supra; Folk v. Milwaukee*, 108 Wis. 359); that mere consequential injury is not a taking of property within the constitutional prohibition (*Alexander v. Milwaukee*, 16 Wis. 247; *Colclough v. Milwaukee*, 92 Wis. 182, 186); that the state for certain public purposes has absolute dominance over navigable streams, without liability to riparian owners (*Cohn v. Wausau B. Co.* 47 Wis. 314). Some of these questions, as we view the case before us, are not essential to its decision, and are of such vast importance, and the effect of a decision so far reaching, that it ought not to be made until squarely presented and fully argued. We cannot but recognize that, as the density of our population increases, as our citizens engage in new and greater industries, and as the municipal aggregations of population mul-

tiply and expand, the original purity of the streams and water basins cannot be wholly preserved. They are the natural and unavoidable courses and receptacles of drainage, through and into which must flow the refuse of human habitation and industry. How far these changing conditions must bring about a yielding of the private rights of continued purity of those lakes and streams to the necessity of use thereof for the public and general health and convenience, and upon what terms such yielding shall come, are primarily questions of policy for the legislature, within the limits of its power over private rights defined by the constitution. When, if ever, the legislature shall enact that streams generally or any streams shall be used as sewers without liability to the owners of the soil through which they run, the question of constitutional protection to private rights may be forced upon the courts for decision. Until such enactment is made, however, in clear and unambiguous terms, we shall be slow to hold by inference or implication that it has been made at all. The right of the riparian owner to the natural flow of water substantially unimpaired in volume and purity is one of great value, and which the law nowhere has more persistently recognized and jealously protected than in Wisconsin. Not alone the strictly private right, but important public interests, would be seriously jeopardized by promiscuous pollution of our streams and lakes. Considerations of æsthetic attractiveness, industrial utility, and public health and comfort are involved. Amid this conflict of important rights, we cannot believe that the legislature concealed, in words merely authorizing municipalities to raise and expend money for the construction of sewers, a declaration of policy that each municipality might, in its discretion, without liability to individuals, take practical possession of the nearest stream as a vehicle for the transportation of its sewage in crude and deletrious condition. At that stage in its logic we cannot

agree with the Indiana court in *Valparaiso v. Hagen*, 153 Ind. 337. The authority granted to municipalities is to construct sewers, but subject to the general legal restrictions resting upon such corporations forbidding invasion of private rights by creation of nuisance or otherwise. This view of the legislative purpose is enforced by the consideration that, although liquid sewage must flow off along the general drainage courses of the vicinity, it is by no means physically necessary that it should carry with it the solids in an offensive or unhygienic condition. *Hackstack v. Keshena I. Co.* 66 Wis. 439. It is a matter of common knowledge, and of proof in this case, that there are practicable methods for the decomposition and practical destruction of such solids before delivering them into open watercourses; the most modern method, as explained in the evidence here, being treatment in septic bacteria tanks, whereby the decomposition and resolution into inoffensive and innocuous fluids, gases, and mineral solids is greatly expedited. This method, it appears, could be installed at *Waukesha* at a cost approximating $5,000. It is not probable that the legislature has wittingly authorized the defilement, and almost destruction, of our streams, to enable such trifling measure of economy to municipalities. The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance, and that it matters not whether such nuisance results from negligence or from the plan adopted. If such nuisance be created, the same remedies may be invoked as if the perpetrator were an individual. The following are selected from an almost unlimited array of decisions: *Jacksonville v. Lambert*, 62 Ill. 519; *Jacksonville v. Doan*, 145 Ill. 23, 29; *O'Brien v. St. Paul*, 18 Minn. 176; *Clark v. Peckham*, 9 R. I. 455; *Good v. Altoona*, 162 Pa. St. 493; *Owens v. Lancaster*, 182 Pa. St. 257; *Haskell v. New Bedford*, 108 Mass. 208; *Morse v. Worcester*,

139 Mass. 389; *Morgan v. Danbury*, 67 Conn. 484; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531; *Chapman v. Rochester*, 110 N. Y. 273; *Missouri v. Illinois*, 180 U. S. 208; *Carmichael v. Texarkana*, 94 Fed. Rep. 561.

From what has already been said our conclusion is obvious that the creation and maintenance of a nuisance by the defendant city, causing special and private damage to the plaintiff, fully appears from the finding and evidence, and that plaintiff is entitled to the same remedies as if the defendant were a private individual. One of the forms of relief authorized by sec. 3180, Stats. 1898, is accorded by the judgment appealed from, and, subject to modification to be hereafter suggested, was entirely proper under the circumstances.

Defendant assigns error upon the admission of certain evidence tending to show that its sewer system might practicably be equipped with septic tanks, or other apparatus to deodorize and render innocuous the outflow, construing this as tending to charge negligence upon the city. The rule is, of course, familiar that in an action tried without a jury the admission of improper evidence alone would not work reversal, but we do not deem this evidence improper. While there was no issue of negligence either in construction or management of the sewer, the prayer for an injunction was addressed to a court of equity, and the effect of such remedy upon the defendant was an important consideration in guiding the court to a decision whether it ought to apply the drastic process of injunction, or ought to leave the plaintiff to her other remedies. It was extremely material to that consideration to ascertain whether such injunction would utterly destroy the entire sewer system of *Waukesha*, and subject its citizens to serious inconvenience, and peril of disease. The fact that the system as now existing could still be used by adding appliances involving no very great expense justifies relief by injunction, and in that respect the evidence was admissible.

It is contended that the complaint warrants no relief in equity, because it fails to allege *in hæc verba* any of the several conditions of equitable relief prescribed by sec. 3180, Stats. 1898. The complaint does, however, allege facts showing fully irreparable injury, and that the same is continuously and constantly recurring, and that any remedy obtainable in a court of law would be inadequate. This must suffice without stating either of these conclusions from the specific facts so alleged.

An objection is raised to the jurisdiction of the county court of Waukesha county for that such court is limited to cases in which "the value or amount in controversy or the amount claimed or sought to be recovered after deducting all payments and setoffs shall not exceed $25,000." We find nothing in this record to support the view that such limit is transcended. The plaintiff's property, which the action is brought to protect, is of value only about $10,000. The damages claimed are but $6,000. If, as appellant contends, we consider the effect upon defendant, we find uncontradicted evidence that the nuisance complained of can be abated by appliances costing only about $5,000. Thus, on any theory of the value or amount in controversy, it is less than $25,000, and we need not consider the several constructions possible to the statute.

While the unlimited form of injunction embodied in the judgment is not discussed as an independent ground of error, yet it is before us upon this appeal, and we do not feel justified in approving the judgment without such qualification as will make obvious the meaning which we are persuaded the trial court intended to express. The judgment restrains defendant "from discharging its sewage through its sewer system into the Fox river at any time after December 1, 1901." Similar language received consideration in *Morgan v. Danbury*, 67 Conn. 484, and was sustained on the ground that the word "sewage" would be understood to refer only

to "the refuse and foul matter, solid or liquid," carried through the sewer by the water therein flowing. In that case, as here, it was contended that some disinfecting apparatus would effectively purify the water. In the case at bar the findings make apparent the views of the trial court that some such addition to defendant's present system could be made practically effective to prevent the damage of which plaintiff complained, and that he had such appliance in mind in his finding "that until December 1, 1901, is a reasonable time to allow said defendant city to change its sewage system, and provide for the doing away with the nuisance to plaintiff." The same idea evidently persisted in the conclusion of law and order for judgment, for it is there declared that defendant "should be restrained from *continuing such nuisance*, and from further emptying or depositing its sewage into said Fox river *in such condition and manner as to create the nuisance to the plaintiff*." We have no doubt the judgment was intended to express the same thing, and only upon that construction do we approve of it. To the end, however, that any ambiguity may be removed, we deem it best to modify the judgment as below.

By the Court.— The judgment of the county court is modified by adding to the second paragraph the following words, to wit: "Unless the same shall have first been so deodorized and purified as not to contain foul, offensive, or noxious matter capable of injuring the plaintiff or her property or causing nuisance thereto," and, as so modified, the same is affirmed.

MACCARTHY, Respondent, vs. WHITCOMB and another, Receivers, Appellants.

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113	[5]134
113	[6]140
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115	[3]188

March 22 — April 9, 1901.

Railroads: Negligence: Personal injuries: Fellow-servants: Court and jury: Immaterial error: Transitory action: Presumptions as to statutes of another state: Excessive damages: Misconduct of counsel.

1. Whether two persons are fellow-servants when all the facts in respect to their several duties and lines of employment are undisputed, is a question of law for the court. While it is improper to submit such a question to the jury, their finding thereon cannot have any significance in supporting a judgment, and may be disregarded on appeal.
2. To constitute fellow-servants it is not necessary that the negligent workman causing the injury and the one injured should both be engaged in the same particular work: it is sufficient if they are employed by the same master, under the same control, and performing duties and services for the same general purpose. Hence, a conductor and a brakeman on a freight train, who negligently leave the train standing on the track without displaying the proper signals, are fellow-servants of a fireman on another train, who is injured by a collision resulting from such negligence. *Phillips v. C., M. & St. P. R. Co.* 64 Wis. 475, distinguished.
3. An action was brought in Wisconsin against a railroad company for an injury occurring in Illinois, caused by the negligence of fellow-servants in the operation of trains. Sec. 1816, Stats. 1898, expressly gives a right of action for all damages sustained within Wisconsin by an employee engaged in the performance of his duty while operating, running, riding upon, or switching passenger, freight, or other trains, engines, or cars, caused by the carelessness or negligence of any other employee. The law of Illinois on the subject of fellow-servants was not proved, but in both states the common law is in force except as modified by statute. *Held*, that the presumption exists that the law of Illinois on that subject is the same as the law in Wisconsin, and that the plaintiff was not barred from a recovery by reason of the negligence complained of being the acts of such fellow-servants.
4. An action against a railroad company by an employee for injuries received in Illinois, being transitory, is triable in the courts of Wisconsin.

5. A railroad fireman, injured in a collision, received a compound fracture of a leg, and all the toes of that leg were amputated. He remained in bed ten weeks, was treated for nearly a year and a half, during which time he was very weak, and suffered a great deal, and for a time was helpless. The foot never got thoroughly well. On the trial of an action therefor, his attorney, in the closing argument, charged that the defendant failed to put certain witnesses on the stand, and that railroad companies had a certain coercive method of calling men in to make statements, and, although warned by the trial court, continued, in substance, that such facts were matter of common knowledge, and that courts take judicial notice that corporations do get men to do those things. *Held*, an abuse of the privilege of counsel.

6. In view of the record and such remarks of counsel a verdict of $7,500 is *held* greatly excessive, and a remission of $2,500 is made a condition of judgment in plaintiff's favor.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Howard Morris* and *Thos. H. Gill*, and oral argument by *Mr. Gill.*

D. J. Hemlock, attorney, and *W. J. Strong*, of counsel, for the respondent.

CASSODAY, C. J. This action was brought to recover damages for personal injuries sustained by the plaintiff on the morning of January 31, 1898, while engaged as a fireman on one of the defendants' locomotives moving a north-bound freight train, at Grayslake station, in Illinois. The circumstances under which the accident occurred are to the effect that about eight o'clock on the evening of January 30, 1898, engine 82, upon which the plaintiff was fireman and P. D. Walsh was engineer, left Chicago, north bound, drawing freight train No. 21, in charge of Conductor Ray and Brakemen Jim McCarthy and Jim Gillis; that the night was stormy, snowing and blowing, and the train proceeded northerly to a point known as Hendee's Crossing, about three miles south of Grayslake station, where the train be-

came stalled, and was unable to proceed further north, by reason of the snow; that Conductor Ray and Brakeman Gillis cut off engine No. 82 from the train, and, with the engineer and fireman, proceeded to the depot at Grayslake, where they arrived some time after one o'clock in the morning of January 31, 1898; that that was not a night station, and Conductor Ray went to the agent's residence, called him up, and returned with him to the station, after which the engineer, Brakeman Gillis, the conductor, and the agent went into the depot, and the agent opened communication with the train dispatcher's office at Waukesha, some fifty miles distant, as directed by the conductor, to get relief for the stalled train; that after some delay Conductor Ray was advised by the train dispatcher at Waukesha that there was a south-bound freight train then at Lake Villa, the station next northerly from Grayslake; that after some discussion as to details with the dispatcher, it was arranged that the extra south-bound freight train, which was drawn by two engines (Nos. 104 and 106), with Conductor Emmons in charge, would proceed to Grayslake, and an order was given to that effect; that, pursuant to the orders given when the south-bound extra train reached Grayslake, the two engines attached to it were cut off, and proceeded southerly beyond the south end of the passing track at Grayslake; that Walsh then returned to his engine No. 82, with the plaintiff and the brakeman, and proceeded southerly of the same switch, and then ran northerly on the side track far enough to allow a clear passage on the main line; that, after the two engines of the extra south-bound train went south of the south passing switch, engine No. 82 backed out and coupled its tender to the rear or tender of the northerly engine of the south-bound freight train, so that the two extra engines were headed south, and Walsh's engine was headed to the north, in order to have an engine pilot in advance in whichever direction they moved; that the three engines thus

coupled proceeded southerly to the stalled freight train, coupled to that train, and returned with it to Grayslake; that at that time Engineer Walsh, with engine No. 82, which was the head engine, controlled the air brake which extended from his engine through the other two engines, and to the freight cars thus equipped in the train, so that, approaching Grayslake, Walsh had entire control of the brakes on the train, and entire control of the movements, communicating his signals by whistles to the other engineers and the train crew; that as they approached the station Engineer Walsh turned on the air brakes, and, after sounding the station whistle, Walsh, being the head engineer, sounded a whistle for off-brakes, and proceeded to work steam, increasing the speed of the train as they reached the south switch; that Walsh proceeded north on the main track until his engine collided with the south-bound freight train, which had been left standing at the north end of the platform without any red light at the south end thereof by Conductor Emmons, of that train, and the plaintiff was injured before he could escape from the engine.

Issue being joined and trial had, the jury returned a special verdict to the effect (1) that the plaintiff was injured January 31, 1898, at the time and place claimed by him, by an accident occurring by reason of a locomotive of the defendants striking a train of the defendants; (2) that the employee of the defendants engaged in operating the locomotive No. 82 was a fellow-servant of the plaintiff; (3) that the employees of the defendants engaged in operating the train of the defendants which was struck by the locomotive were fellow-servants of the plaintiff at the time of the accident; (4) that the plaintiff at the time of the accident did not know that there was a train standing on the track at Grayslake; (5) that there was no red light on the south end of the south-bound train at the time of the accident; (6) that the conductor and brakeman in charge of the south-bound train

were not fellow-servants of the plaintiff at the time they failed to put such light on the south end of such train; (7) that it was a want of ordinary care on the part of the defendants' employees in charge of the south-bound train to leave said train standing on the main track without such light; (8) that the failure to put such red light on the south end of the south-bound train did contribute to the injury suffered by the plaintiff; (9) that the absence of such light was the proximate cause of the plaintiff's injury; (10) that Engineer Walsh did not know that the south-bound train was standing on the main track in time to have prevented the collision by the exercise of ordinary care; (11) that the plaintiff did not know that the train was standing on the main track in time to have prevented the collision by the exercise of ordinary care; (12) that, if a red light had been on the south end of the south-bound train, the plaintiff could have seen the same in time to have jumped from his engine before it struck said train; (13) that Conductor Emmons in failing to put such light on the south end of the south-bound train did violate the rules of the defendants; (14) that the defendants' employees were guilty of negligence which was the natural and probable cause of the accident by which the plaintiff was injured, and which accident, in the light of the attending circumstances, ought reasonably to have been foreseen by a person of ordinary intelligence, care, and prudence; (15) that the plaintiff was not guilty of any want of ordinary care and prudence which contributed directly to produce the injury complained of; (15½) that Engineer Walsh was not guilty of any want of ordinary care and prudence which contributed directly to produce the injury to the plaintiff; (16) that, if the plaintiff is entitled to recover in this action, they assessed his damages at $7,500.

From the judgment entered thereon in favor of the plaintiff for that amount, with costs, the defendants bring this appeal.

It is contended on the part of the defendants that, before leaving the depot at Grayslake, it was understood and agreed by both conductors and Walsh, the engineer of the plaintiff's engine, that the south-bound train should be left upon the main track at the north end of the platform while the two engines belonging to that train went south to aid in bringing the stalled train to the south switch at Grayslake; that upon reaching that point Walsh's engine, 82, was to be cut off and put upon the side track, while the other two engines were to be cut off from the stalled train and backed up to the south-bound freight train so standing upon the main track, and coupled to it; and that in the meantime Walsh, with engine 82, was to back down to the stalled train and couple to it, and draw it up onto the side track, so as to allow the south-bound train and the two engines to pass south upon the main track; and that, contrary to such understanding and agreement, Walsh, as engineer of the north-bound train, having full charge of the movements and air brakes on that train, failed to stop at the south switch, as so agreed, but continued north on the main track at a rapid speed until his engine ran into the south-bound train so standing upon the main track; and hence that his negligence was the proximate cause of the plaintiff's injury. By the answer to the tenth question the jury found that Walsh did not know that the south-bound train was standing on the main track in time to have prevented the collision by the exercise of ordinary care, and by their answer to question No. 15½ they found that Walsh was not guilty of any want of ordinary care and prudence which contributed directly to produce the injury to the plaintiff. In respect to the south-bound train being so left upon the main track without any danger signal, the jury found, in effect, (5) that there was no red light on the south end of the south-bound train, at the time of the accident; (7) that leaving such train so standing on the main track without such light was a

want of ordinary care on the part of the employees of the defendants in charge, (8) which contributed to the injury of the plaintiff, (9) and was the proximate cause of his injury; (14) and that such employees of the defendants were guilty of negligence, which was the natural and probable cause of the accident, and ought reasonably to have been foreseen by a person of ordinary intelligence, care, and prudence; (13) and that Conductor Emmons, in failing to put such light on the south end of that train, violated the rules of the defendants. The rules required that each train running after sunset, or when obscured by fogs or other cause, display a headlight in front and two red lights in the rear; that the conductor must know that his train is fully protected in both directions, and he is held responsible for any accident which occurs from a want of any precaution that could have been taken. It appears in evidence, also, that it was customary to put a red light on the south end of a train under the circumstances stated, and that it was not customary to leave such train, under such circumstances, without such red light. It is undisputed that there was no red light upon the south end of the train so left upon the main track, and that leaving the same without such danger signal was negligence, and the proximate cause of the injury to the plaintiff.

The findings of the jury fully exculpate the plaintiff from all blame in that respect, and are to the effect (4) that the plaintiff at the time of the accident did not know that there was a train standing on the track at Grayslake; (11) and that he did not know that the train was standing on the main track in time to have prevented the collision by the exercise of ordinary care; and (15) that the plaintiff was not guilty of any contributory negligence. The question recurs whether upon such findings the plaintiff is precluded from a recovery by reason of the fact that the negligence found was the act of a co-employee. It is conceded by all that the plaintiff's engineer, Walsh, and all the defendants' employees engaged

at the time in operating the north-bound train were fellow-servants of the plaintiff. The plaintiff contends, however, and the jury found, (3) that, although the employees of the defendants engaged in operating the south-bound train were fellow-servants of the plaintiff *at the time of the accident*, yet (6) that the conductor and brakeman in charge of that train were not "fellow-servants of the plaintiff *at the time they failed to put such light on the south end of such train.*"

Such questions were undoubtedly submitted to the jury in pursuance of what was said in a case from Illinois cited by counsel. *Illinois S. Co. v. Bauman*, 178 Ill. 351, 356, and other cases from that state. But whether two persons are fellow-servants when all the facts in respect to their several duties and lines of employment are undisputed, as here, and as is generally the case, is a question of law for the court. Of course, it was improper to submit such questions of law to the jury. *Heddles v. C. & N. W. R. Co.* 74 Wis. 239; *Baxter v. C. & N. W. R. Co.* 104 Wis. 313. But, since their findings upon such questions of law cannot have any significance in supporting the judgment, they may be disregarded. The question whether Conductor Emmons and the defendants' employees engaged in operating the south-bound train were fellow-servants of the plaintiff at the time they failed to put such red light on the south end of that train must be determined as a matter of law, regardless of the verdict of the jury. It was held by this court at an early day that trackmen engaged in repairing the track, who had taken up rails without giving sufficient notice to those in charge of an approaching train, were fellow-servants with a brakeman injured on such train in consequence of the removal of such rails without such notice. *Cooper v. M. & P. du C. R. Co.* 23 Wis. 668. That case has frequently received express sanction from this court. *Toner v. C., M. & St. P. R. Co.* 69 Wis. 197, 198, and cases there cited. In this last

case an unattached freight car, left at night on a level side track near a railroad station, was in some manner moved upon the main track, obstructing it, and in a collision with a passing train caused thereby a brakeman on the train was injured; and it was held that although, by the rules of the company, its station agent was held responsible for the safety of the switches, and was expressly required to see that the main track was kept clear and unobstructed for the passage of trains, and to be out at the station and know that everything was right when trains were passing, yet such agent was a fellow-servant of such brakeman. In that case it was said by Chief Justice COLE:

"To constitute fellow-servants, within the meaning of these cases, it is not necessary that the negligent workman causing the injury and the one injured should both be engaged in the very same particular work. It is sufficient if they are employed by the same master, under the same control, and performing duties and services for the same general purpose." Page 198 and cases there cited.

In *Phillips v. C., M. & St. P. R. Co.* 64 Wis. 475, 486, it was held that the employees upon one of the colliding trains were not fellow-servants with those on the other; but that was put on the ground that "neither the Wisconsin Central nor the defendant had any control over the employees of the other, except that upon the track in question the Wisconsin Central trainmen were required to obey the rules prescribed by the defendant's general manager, and the special orders given by the defendant's train dispatcher." That case is clearly distinguishable from the one at bar. The cases in this court support the proposition that Conductor Emmons and those in charge of the south-bound train were fellow-servants with the plaintiff at the time they neglected their duty to place a red light at the south end of the south-bound train. In this we are, according to Mr. Elliott, in harmony with "the weight of authority." 3 Elliott, R. R. § 1331. He there says:

"There is, as we think, no valid reason for discriminating between cases where the employees are engaged in operating the same train and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service and by a common master." See numerous cases cited by him.

But, notwithstanding Conductor Emmons and those in charge of the south-bound train were such fellow-servants of the plaintiff, yet if the accident had happened in this state there could have been no question but that, under our statute, the plaintiff could have recovered. Sec. 1816, Stats. 1898. That section expressly gives such right of action for all damages sustained within this state by an employee engaged in the performance of his duty as such, while "operating, running, riding upon or switching passenger, freight or other trains, engines or cars," "caused by the carelessness or negligence of any other employee." Of course, that section is not in force in Illinois, where this accident occurred. The defendants, by way of answer, alleged "that the common-law rule as to the relation of master and servant obtained in the state of Illinois," and that the plaintiff's injury was caused by the negligence of a fellow-servant, and hence under the law of that state there was no liability. But neither the defendants nor the plaintiff proved or attempted to prove the law of Illinois in that respect. The question recurs, What presumptions, if any, are to be indulged? It will be observed that this action is not based upon a statute of another state — much less, a penal statute — like some cases which have been in this court. *Hull v. Augustine*, 23 Wis. 383; *Anderson v. M. & St. P. R. Co.* 37 Wis. 321; *Bettys v. M. & St. P. R. Co.* 37 Wis. 323; *Schoenberg v. Adler*, 105 Wis. 645, 649, 650; *Bartlett v. Collins*, 109 Wis. 477. Nor did the cause of action arise in some state or country where the civil law is in force. *St. Sure v. Lindsfelt*, 82 Wis. 346, 351, 352. As indicated, the cause of action is for personal injury caused by a want of ordinary

care of the employees of the defendants. Such a cause of action is cognizable at common law. It arose in Illinois, where the common law is in force, except as modified by statute. Being a transitory cause of action, it was triable in the courts of this state. *Eingartner v. Illinois S. Co.* 94 Wis. 80, 81. In view of the numerous decisions of this court, and after careful consideration, and in the absence of any proof of the statutes of Illinois on the subject of fellow-servants, we must hold that the presumption is that the law of that state on that subject is the same as the law in this state, as above indicated. *Rape v. Heaton*, 9 Wis. 328, 337, 342; *Walsh v. Dart*, 12 Wis. 635; *Osborn v. Blackburn*, 78 Wis. 209; *St. Sure v. Lindsfelt*, 82 Wis. 346, 351; *Schoenberg v. Adler*, *supra*. We must hold that the plaintiff is not barred from a recovery by reason of the negligence complained of being the acts of fellow-servants.

Several questions are discussed by counsel in relation to the admission of evidence, the submission of certain questions to the jury, and certain portions of the charge of the court; but the views expressed dispose of the case upon the merits and upon undisputed evidence.

Among the grounds urged for a reversal is that the damages are excessive. The plaintiff had all the toes taken off his right foot. He had a compound fracture of his right leg, which was badly injured. He remained in bed after the accident for ten weeks, and was treated for nearly a year and a half. During that time he was very weak, and suffered a great deal, and for a time was helpless. The foot never got thoroughly well. The damages assessed by the jury are very large. Counsel for the plaintiff, in his closing argument to the jury, persistently, and despite the efforts of the court to stop him, used language well calculated to excite and prejudice the jury against the defendants, as receivers of a railroad corporation, by charging a failure to put men on the stand as witnesses, by stating that he would not

retract after the court had ruled that his language was improper, by stating that he made his statement in good faith, and stating that the conduct of the defendants was strange, in not putting men on the stand as witnesses, and that railroads had "a certain coercive method . . . of calling men in to make statements." Then, after being commanded by the court to stop, and being told that his language was improper, he continued:

"I predicate it on this: It is a matter of common knowledge. A lot of things everybody knows is a matter of common knowledge. The court will take judicial notice, and every man in the community will take notice, that corporations do get men to do these things. It is a matter the court ought and the jury ought to take notice of without positive proof. Railroads have been given special rights and franchises. It is what he would be entitled to if it were you or your boy."

Such conduct is not tolerated from members of the bar in this state, and cannot be from attorneys appearing *ex gratia*. *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348, 361, 362; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157; *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292; *Schaidler v. C. & N. W. R. Co.* 102 Wis. 564; *Taylor v. C. & N. W. R. Co.* 103 Wis. 27. Upon the record in this case, and in view of such remarks of counsel, we must hold that the damages assessed were greatly excessive, and that the plaintiff should not be allowed to recover more than $5,000 as damages.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial, but with the option on the part of the plaintiff, to be exercised within thirty days after the *remittitur* from this court is filed in the trial court, to remit, in writing, from the verdict, all damages in excess of $5,000, and file such remission with the clerk of the trial court, in which event judgment is to be entered thereon for the plaintiff for $5,000 damages, and the costs and disbursements in the circuit court.

HAWKES, Respondent, vs. SLIGHT and wife, Appellants.

110 125
112 *377

March 23 — April 9, 1901.

Wills: Foreclosure of legacy: Parol gift of land: Evidence: Appeal: Questions reviewed.

1. In an action to enforce a legacy alleged to be a charge on certain real estate, where the defendant claimed ownership under a parol gift made many years prior to the will, in the absence of any specific finding upon the question of the alleged gift, and the uncertainty as to the proper construction of a finding that the defendant never acquired title except under the terms of such will, the supreme court on appeal will examine the evidence upon the question of the parol gift to ascertain whether the preponderance thereof supports the plaintiff's contention.
2. A testator devised a farm to defendant, his son, charged with a legacy in favor of plaintiff, his daughter, the will being made in 1892. Defendant moved onto the farm in 1876, and had continued in possession for more than twenty years prior to the commencement of the action, making valuable improvements and paying the taxes, except for one year, when they were paid by testator, who took a receipt in his son's name. Defendant claimed title to the farm by parol gift from the testator at the time he moved onto the farm, though such claim was never heard by any member of the testator's family. In 1889 the testator stated to insurance officials, in the presence of the son, and without his denial, that the property was his, and, in an application for insurance on buildings thereon, the son stated that testator's title to the premises was absolute. During the first ten years of defendant's occupancy the testator used wood for his household and lime kiln from the farm, and when defendant sold any he asked permission of testator. Testator's relations with the members of his family were pleasant, no reason appearing why he would disinherit any of his children; but if the devise to defendant, with the charge thereon, was not upheld, the plaintiff would be disinherited, no other provision being made for her, and defendant would receive more than one third of the entire estate, four children and his widow surviving. *Held*, that the facts pointed strongly to and were consistent with an intention on the part of the testator to give the title to the farm to such son by will, and not by the alleged gift.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This is an action in equity to foreclose a legacy alleged to be charged upon certain real estate. One John P. Slight, the testator, died October 5, 1896, a resident of Watertown, in this state, having at the time of his death record title of the land in question, which land consisted of a farm of 154 acres in the town of Emmet, Dodge county. This farm for nearly twenty years prior to the testator's death had been in possession of his son the defendant *William T. Slight*, and was known in the family as the "old farm." The testator was also seised of another farm, consisting of 140 acres of land, in the same town, which was known as the "home farm." The acreage value of these farms was about the same, being about $90 per acre. The testator also left personal property to the amount of about $7,500. He left surviving him a widow and three sons,—*William*, John, and Frank,—and one daughter, the plaintiff, *Annie Hawkes;* all being adults and all married. By his will, which was made in November, 1892, he left the "home farm" to his son John, charged with a legacy of $4,000 (afterwards by codicil reduced to $3,000), payable to Frank, the "old farm" to his son *William*, the defendant, charged with the payment of a legacy of $4,000 to his daughter, *Annie*, the plaintiff; and the remainder of his property he left to his wife. His will was duly probated, and the estate settled and the property assigned in accordance with the terms of the will. The defendant *William* refused to pay to the plaintiff her legacy, and this action was brought to enforce and foreclose the same.

The defendant's answer admits that the testator originally owned the farm in controversy, but alleges that he made an oral gift of the same to the defendant *William* in the year 1876, in consideration of natural love and affection and of the defendant's marriage to his codefendant, and

further alleges that the defendant *William* has been in possession of said farm ever since October, 1876, paying the taxes thereon, and making considerable improvements in reliance on such gift. The answer also alleges title by adverse possession for more than twenty years since October, 1876, and denies that the testator owned the farm at the time of his death, and denies that the plaintiff's claim is a lien thereon. The evidence showed that the defendant *William* was married to his codefendant in September, 1876, and that he and his wife went to live upon the farm in question about October 25, 1876, and have ever since occupied the same, paying the taxes thereon for all that time, except two or three years; that the defendant *William* has kept up the fences on the land, made improvements thereon, consisting of the building of barns and other farm buildings, and breaking and grubbing a part of the land, which improvements amount, in all, as estimated by the defendant, to about $4,000. The evidence further showed that *William* has taken all the profits of the land during the entire time which he has been in possession. There was considerable evidence to the effect that John P. Slight, the father, had made declarations to various persons during his lifetime that he had given the farm to *William*. There was also evidence of declarations of John P. Slight and of acts of the parties tending to show that John P. Slight never regarded the farm as having been given to his son, but that he always claimed title thereto. The court made no specific finding on the question of gift, but found, among other facts, that John P. Slight died seised of the land in question; that the defendant *William T. Slight* never was the owner of said real estate, and never held the same or any part thereof by adverse possession, and never at any time acquired any title to said real estate, except by the terms and under the conditions of the last will of said John P. Slight.

Judgment was entered establishing the legacy as a lien upon the said real estate, and providing for the sale of the same unless the legacy should be paid, and from this judgment the defendants appeal.

For the appellants there was a brief by *Sanborn, Luse, Powell & Ellis* and *J. E. Malone*, attorneys, and a supplemental brief signed also by *Burr W. Jones*, of counsel, and oral argument by *Mr. A. L. Sanborn* and *Mr. Jones.*

Harlow Pease, for the respondent.

WINSLOW, J. The defendant *William* claimed to have acquired title to the farm by an executed parol gift from his father in 1876, and by adverse possession for more than twenty years. The trial court found specifically against the claim of title by adverse possession, but made no specific findings upon the question of the alleged gift, unless it can be said that the finding to the effect that the defendant *William* never acquired any title except under the terms of his father's will be such a finding. This latter finding is, at least, of doubtful import. While it may be construed as negativing the fact of gift, it is also susceptible of a construction to the effect that title could not, as matter of law, be transferred by parol gift. In view of this uncertainty as to the proper construction of the findings, we have concluded to examine the evidence upon the question of the parol gift, and ascertain whether the preponderance thereof supports the plaintiff's contention. If it be found that such is the case, then, in the absence of any other established defense, the judgment must be affirmed. *Brown v. Griswold*, 109 Wis. 275. It is true that title to land cannot be transferred by parol (Stats. 1898, sec. 2302), but it is equally true that equity will protect and specifically enforce a parol gift of land if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements upon the property. *Neale v. Neales*, 9 Wall. 1. Such a gift,

however, must be established by certain and unmistakable evidence and the fact that substantial and valuable improvements were made in reliance upon it must be directly and unequivocally proved. *Dawson v. McFaddin*, 22 Neb. 131; Pomeroy, Cont. §§ 130, 131. The question, therefore, is whether the evidence clearly and unmistakably shows in the present case that there was a parol gift of the land in question by the testator to his son in 1876, in reliance upon which the defendant made substantial improvements upon the land. There is no direct evidence of any conversation in which the testator said to his son that he gave him the farm, or that the son went into possession as the result of such a conversation, but the facts relied upon to substantiate the claim of an enforceable parol gift are briefly as follows: In October, 1876, the defendant *William*, with the knowledge and consent of his father, went to live upon the farm with his newly married wife, and has lived upon it ever since, receiving the ordinary rents and profits, paying the taxes for all years except one when his father paid them in his son's name, making improvements, in the way of buildings and grubbing, aggregating about $4,000. During that time he has frequently claimed to third parties that he owned the farm. During that time, also, the testator made statements to numerous parties to the effect that he had given the farm to *William*, that it was *William's* farm, that he had given *William* a home, and the like. The defendant paid the premiums for insurance upon the farm buildings. When defendant went to live upon the farm, a tenant of his father had just moved out of the house, apparently by his father's direction, and the house was furnished with furniture and utensils by his father.

Upon the other side the claim was that the alleged gift was disproved by evidence tending to show the following facts: The testator stated to several persons at various times when the question of ownership of the land was mentioned

that he still owned it. (This testimony was received under objection and exception.) The testator's will, made in 1892, demonstrates that he still considered himself the owner of the land. The defendant's brother John, his mother, his sister, the plaintiff, and his cousin William J. Slight all testified that they never had heard the defendant claim that he owned the farm or that his father had given it to him during the testator's lifetime, and no member of the family testified to having ever heard of such claim. In 1884, 1889, and 1890 the defendant made written applications to the Hustisford Mutual Insurance Company for insurance upon the farm buildings and personal property, which he signed in his father's name, and in which it was stated that his father's title to the property was absolute. A barn burned upon the farm in 1889, and at a meeting between the officers of the company and the defendant and the testator held for the purpose of adjusting the loss in September, 1889, the testator stated to the officers in presence of the defendant, and without objection by him, that the property was all his, and the loss was settled on that basis; the money paid being afterwards used by defendant to replace the destroyed building. During the first eight or ten years after defendant went into possession of the farm the testator cut and hauled from seven to ten cords per year of firewood for his own use from the farm, and in 1884 cut and hauled away for use in his lime kiln about 250 cords of wood, without objection by the defendant. The defendant for several years sold wood to the school district, and before doing so asked permission of his father to sell it. A lumber dealer testified that when the defendant came to purchase lumber of him to rebuild the burned barn in September, 1889, the defendant said he would have to see his father before he closed the deal, and that afterwards, on being called upon to pay a part of the bill, which had run for some years, he stated, as the witness recollects, that he did

not own the farm; that it belonged to his father. As to this transaction, the defendant, without specifically denying the lumber dealer's evidence, stated that he told the lumber dealer that he did not have the whole of his insurance money, and the dealer wanted to know if he could not get it, and "I didn't have title to the property, and couldn't raise the money." The tax rolls for 1877 and 1878 show that John P. Slight paid the taxes on the farm for those years, and the evidence shows that he also paid them for the year 1889, and took the receipt already made out in his son's name, and kept it among his own papers. As to the insurance transactions, the cutting and selling of wood, the payment of the tax of 1889 by the testator, there was no controversy, but the defendant claims that he paid the taxes of 1877 and 1878.

The foregoing is a substantially complete statement of the facts in evidence upon which the question of parol gift must be determined. Reviewing the facts, and rejecting the statements of the testator as to his ownership of the farm as self-serving declarations, we reach the conclusion, without difficulty, that the defendant has failed to establish by certain and unmistakable evidence that such a gift was made, or that his improvements were made in reliance thereon.

When the relationship of the parties is remembered, it seems very clear that the acts of the parties are fully as much, if not more, in harmony with the idea that the farm was intended to be devised to the defendant by will, than with the idea that it had been given outright to the defendant in 1876. The burden was upon the defendant to prove the gift clearly and unmistakably, and he is confronted with numerous admitted acts of himself and of his father of which he knew, which refute the idea of a completed gift most strongly, and tend to show that the defendant's possession was simply permissive. It is true that the defendant had paid considerable sums for taxes and improvements, but,

on the other hand, he has had the income of a valuable farm of 154 acres during the whole time, which must amount to far more than the expenditures which he had made. Again, the situation of the testator and his relations to his family are entitled to consideration in judging of the construction to be given to doubtful acts. The testator was on good terms with his children and his wife. No reason appears why he should desire to disinherit any of his children. The farm in question was found to be worth $14,500; the home farm, of 140 acres, at $90 per acre, would be worth $12,600, and he left personal property worth $7,500; making the value of his entire estate $34,600. Now, if the defendant's contention be sustained, it would result in the defendant's receiving considerably more than one third of the entire property, besides having had the rents and profits thereof for twenty years; his sister being disinherited; the mother and the other children each receiving from one fourth to one half of the amount received by the defendant. On the other hand, if the plaintiff's contention be sustained, the defendant still receives the largest individual share of the testator's estate.

We can come to no other conclusion than that the testator placed the defendant on the farm with the intention of giving him title by will, but not with the intention of transferring title by the gift itself. In our judgment, all the significant facts point strongly that way, or are entirely consistent with that idea; and we feel no hesitation in so deciding, even in the absence of a specific finding of the trial court upon the question.

As to the claim of adverse possession we need spend little time. The considerations already stated bear with practically equal force against this claim as against the claim of parol gift. Moreover, the trial court found directly against the defendant's claim of title by adverse possession, upon ample and persuasive evidence.

By the Court.— Judgment affirmed.

ENDRESS, Appellant, vs. SHOVE and wife, imp., Respondents. 110 116 133 48

March 23 — April 9, 1901.

Mortgages: Tax liens: Status: Right of mortgagee to pay or purchase: Foreclosure: Deficiency: Joinder of causes of action: Parties: Pleading: Waiver.

1. If a mortgagee of real estate, in order to protect his interest therein, pays or purchases tax claims thereon, the status of such claims, as tax liens, is thereby extinguished, but there is created, by force of the statute, a lien, in favor of the payor, upon the realty, for the amount of his expenditures and interest, secured by the mortgage, of as high a grade as the original mortgage lien.
2. The right to the additional lien under the circumstances stated is statutory and absolute. The court has no more power to deny or diminish or refuse to enforce it against the realty, or, if the mortgagor agreed in the mortgage to pay the taxes, to refuse to enforce the amount of such lien against the mortgagor as a personal liability, than he has to arbitrarily reduce the amount actually due upon the principal debt.
3. In an action to enforce a mortgage there must be a foreclosure and sale of the subject thereof adjudged as the statute provides, unless waived by the mortgagee; and that is so regardless of the interest of the mortgagor in the premises at the time of such enforcement.
4. A cause of action to enforce a mortgage, and one to recover on the personal liability of the mortgagor, grow out of the same transaction and are connected with the same subject thereof, hence may be joined under the statute on that subject regardless of the statutory provision for deficiency judgments in foreclosure cases, provided no one other than the debtor is made a defendant and the two causes of action are separately stated.
5. If two causes of action are joined under the circumstances above stated and a person other than the debtor is made a defendant or the causes of action are not separately stated, such defects are waived by answering the complaint, and the plaintiff is entitled to enforce both causes of action. The court has, in such circumstances, no mere equity power to refuse to grant to the plaintiff relief upon both, if the facts are sufficient for the purpose.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Door county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed in part; reversed in part.*

Action to bar the dower right of the wife of *Theodore C. Shove* in real estate, mortgaged by them April 12, 1892, to secure payment of a note of $4,000 made on that day by *Mr. Shove*, payable April 12, 1895, and to obtain a personal judgment against him. The complaint alleged payment of $2,000 on May 4, 1892, and that the balance of the principal of the note, with interest according to its terms, was due. It was further alleged that on October 15, 1892, one Harvey F. Hubbard obtained a judgment against *Mr. Shove* in an action wherein the mortgaged premises were attached April 13, 1892, before the delivery of the mortgage; that such proceedings were duly had to enforce such judgment and the attachment lien secured in such action, that the interest which *Shove* had on April 13, 1892, was sold at sheriff's sale, and a certificate of sale on execution was issued to the purchaser in due form of law, from which plaintiff, as a subsequent incumbrancer, redeemed, and thereby became subrogated to the rights of such purchaser; that thereafter said execution sale was completed by the making of a sheriff's deed to plaintiff, vesting in him all the right, title, and interest which *Mr. Shove* had in the property covered by the mortgage on April 13, 1892. Judgment barring the dower right of *Mrs. Shove* was prayed for. Judgment was also asked against *Mr. Shove* for the amount of the indebtedness.

Mr. Shove answered, among other things, that on and prior to April 12, 1892, Adolph J. Endress, son of plaintiff, was associated with him in the banking business, and that the former was the duly authorized agent of plaintiff in all of his business transactions, including that of taking the note and mortgage in suit; that on the said 12th day of April the banking concern was insolvent and made an assignment for the benefit of its creditors whereby said defendant directly and indirectly lost all of his property; that the property described in the complaint was the banking house and real estate upon which it was situated; that it

was a valuable piece of real estate which belonged to defendant; that on the day the said assignment was made plaintiff and his said son, with knowledge of all the facts in regard to the bank and defendant's personal affairs, and intending to defraud defendant, induced him, the son being the active party in his behalf, to give the note and mortgage in suit under a promise made by the son on behalf of his father that it should be in satisfaction of an old debt of $2,000 owing by said defendant to plaintiff, and for $2,000 additional to be loaned said defendant on three years time at six per cent. interest; that the note and mortgage were delivered to plaintiff's son on the faith of such arrangement, who delivered them to plaintiff, who has ever since retained the same, though he has neglected and refused to loan to defendant the agreed sum of $2,000 or to deliver the note representing the old indebtedness of $2,000; that he still retains the old note and is seeking to recover thereon in an independent action. *Mr. Shove* asked affirmative relief, among other things, declaring the note and mortgage in suit void. *Mrs. Shove* answered repeating the allegations of her husband's answer in regard to the circumstances of giving the note and mortgage in suit, and alleged further that when the same were given, plaintiff held, as collateral to the old note, two insurance policies upon the life of *Mr. Shove*, and that it was agreed that in consideration of her signing the mortgage said insurance policies should be surrendered to her, and that such delivery had never been made although it had been duly demanded. Both answers admitted the allegations of the complaint in respect to the attachment of the mortgaged premises, the enforcement of the attachment lien, and the acquirement of the title to the mortgaged property pursuant to the sheriff's sale as alleged in the complaint.

On the controverted issues the court found as follows: No actual payment of $2,000 was made upon the note and

mortgage in suit. The indorsement of such payment was on account of the $2,000 which plaintiff agreed to advance to *Mr. Shove* but thereafter refused to do. June 1, 1888, *Mr. Shove* gave plaintiff, for value, his note for $2,000 payable two years after date, with interest at the rate of six per cent. per annum payable semi-annually, and as collateral thereto assigned to plaintiff two insurance policies as alleged in the answer of *Mrs. Shove.* On May 12, 1892, plaintiff still held the note of $2,000 and said collateral, there being then due on said note $2,104. At that time *Mr. Shove* was also liable to plaintiff as guarantor of the payment of a note of $10,000 made to plaintiff by his son, Adolph J. Endress. The note and mortgage described in the complaint were given according to an agreement between *Mr. Shove* and plaintiff to the effect that the latter should, upon delivery thereof, surrender to *Mr. Shove*, as fully paid and satisfied, the old note of $2,000 made June 1, 1888, together with the two insurance policies held as collateral thereto, and should also advance to *Mr. Shove*, for the use of himself and family, the sum of $2,000. The indorsement of $2,000 on the note in suit was made by agreement between plaintiff and *Mr. Shove* after the former refused to make the advancement agreed upon for the benefit of the latter's family. The policies of insurance, and the old note of $2,000, were retained by plaintiff, though due demand for their delivery to *Mr. Shove* was made. An action is pending to enforce payment of the old note, in which action it has been determined that said note and the collateral must be surrendered to *Mr. Shove* and the indorsement on the note in this action reduced by $100 to cover the interest that was due on the old note when the new one was given. The transaction of giving the note and mortgage in suit was wholly conducted, on the part of the plaintiff, by his son Adolph, who was fully authorized in the premises. There was no intention, in the transaction of taking the note and mortgage, to de-

fraud *Mr. Shove.* There is due plaintiff upon the note, for principal and interest, $2,924.64. The amount due him, including taxes paid upon the property to protect the mortgage security, is $3,275.64.

On such facts it was held as matter of law that plaintiff was the owner of the mortgaged property subject to the inchoate right of dower of *Mrs. Shove,* which was not a proper subject for a judicial sale; that no personal judgment should be rendered in the action against *Mr. Shove;* that *Mrs. Shove* should not be personally charged with costs, except as a condition of redeeming her inchoate right; that she was entitled to make such redemption by paying the amount due on the note and mortgage, as fixed in the findings of fact, with interest from the date thereof and the costs of the action, within fourteen months after the entry of judgment duly perfected. Judgment was entered accordingly.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *L. J. Nash.*

For the respondents the cause was submitted on the brief of *Geo. G. Greene.*

MARSHALL, J. The trial court determined the amount due upon the note the mortgage was given to secure according to its terms. We are unable to discover any error in that. True, the note was given, as the court found the fact to be, in part for another note, and it was not sufficient to cover the latter after allowing for $2,000 which the court decided appellant agreed to loan on the former. But it was competent for the parties, if they saw fit, to treat the new note and the security for its payment, to the extent of $2,000, as a full equivalent for the old note secured by the policies of insurance. One was a good consideration for the other, and a full consideration therefor, if such was the agreement between the parties. Notwithstanding there was no dispute about the amount due upon the old note, the se-

curity for its payment, at the time the agreement to give the new note was made, may reasonably have been considered much less valuable than the real-estate security, and the substitution of the latter for the former a fair exchange upon the basis of the one being a full equivalent for the other. The effect of the court's findings is that the parties contracted on that basis, either expressly or impliedly.

The evidence shows that appellant redeemed the mortgaged premises from taxes to the amount of $284.57, before he acquired the legal title by the sheriff's deed, and that such amount, with interest to the date of the court's findings, was $350.95. As soon as the redemption was made the outlay therefor became a lien upon the premises secured by the mortgage. The tax lien was extinguished and in its place was created a mortgage lien by force of the statute, of as high a grade at least as the lien of the indebtedness evidenced by the note. Sec. 1158, Stats. 1898; *Hill v. Buffington*, 106 Wis. 525. The trial court erred in disregarding the law on that point. The right of appellant to the benefit of the conditional lien, for the money paid for taxes, was secured to him by the plain letter of the statute. The court had no more right to deny him the benefit thereof than to reduce by its decree the amount of the indebtedness upon the note. However, since the amount of appellant's lien as adjudged was large enough to preclude any probability of redemption by *Mrs. Shove* to save her inchoate right of dower, we are unable to see how the error is prejudicial to appellant so far as relates to the relief granted barring such dower right.

This action was not brought under the statute, to foreclose the mortgage, therefore the provisions thereof in relation to a personal judgment against the mortgagor, *Theodore C. Shove*, has no application. It is by no means certain that if the mortgagees had stood upon their rights as to the judicial enforcement of the mortgage, such a judgment as we

have here could properly have been rendered. The statutes of this state are mandatory as to judicial proceedings to enforce a mortgage, regardless of the value or nature of the interest of the mortgagee in the subject of the mortgage. However, respondent submitted to the proceedings adopted by appellant, so there is no complaint that can now be successfully heard here in regard thereto, unless the trial court committed prejudicial error against appellant in refusing to award him the full benefit of the remedy he invoked.

Complaint is made because of the refusal to render a personal judgment against *Mr. Shove.* This language was used in the trial court's decision: "The plaintiff cannot in this action be given a personal judgment for the recovery of the amount due on the note." We assume that the court supposed that, since the action was not a statutory foreclosure of the mortgage, rendering the statute on the subject of deficiency judgments applicable, a personal judgment would be improper. The complaint plainly indicates that the pleader intended to secure the benefit of a cause of action against *Mr. Shove* to recover on his personal liability in the equitable action to bar the dower right of *Mrs. Shove.* The two causes of action arose out of the same transaction and were connected with the same subject of action. Therefore they were such causes of action as may be properly joined under subd. 1, sec. 2647, Stats. 1898, which provides that causes of action, whether they be such as were formerly denominated legal or equitable or both, may be joined where they arise out of the same transaction or are connected with the same subject of action. True, the statute further requires, as a condition of the joinder, that the several causes of action shall affect all the parties, and be separately stated, which condition was not satisfied in this case. But it has been repeatedly held that objection on that ground is waived unless taken by demurrer. So it seems that the trial court was wrong in deciding that appellant could not

have a personal judgment against *Mr. Shove.* Probably the learned court was guided by the early decision of this court in *Walton v. Goodnow*, 13 Wis. 661, and decisions to the effect that, without statutory authority, a personal recovery as in an action at law cannot be had in a suit to enforce a mortgage, overlooking subsequent decisions holding that such relief is proper under the Code independent of any statute allowing a deficiency judgment in a foreclosure action. In *Sauer v. Steinbauer*, 14 Wis. 70, *Jesup v. City Bank*, 14 Wis. 331, and *Cary v. Wheeler*, 14 Wis. 281, it was held that the Code provision to which we have referred permits the joinder of an equitable cause of action to enforce a mortgage and an action at law upon the note it secures, if the mortgagee is the only party defendant; and that if there is such a joinder of causes of action where there are defendants unaffected by the personal liability, the defect is waived by failure to demur upon that ground, and both causes of action may proceed to judgment upon equitable principles. Following that rule, a judgment for a deficiency, after the exhaustion of the mortgage security, was held proper, notwithstanding there was no express statute allowing such a recovery.

It follows that appellant was entitled, as a matter of right, to a judgment against *Shove* for the amount of the latter's personal liability. The limit of that would be the amount due upon the note if the sole reliance of appellant to recover the expenditures for taxes was the statute (sec. 1158) making such expenditures a lien secured by the mortgage; but such was not his sole reliance. The mortgage contained an express agreement that *Shove* would pay the taxes. His breach thereof rendered him personally liable for the damages caused thereby to appellant. So the full amount of his personal liability included the expenditures made to redeem the mortgaged premises from taxes. A personal judg-

ment should have been rendered in appellant's favor for such amount, with the costs of the action.

By the Court.— The judgment appealed from, as to *Ellen E. B. Shove*, is affirmed. As to *Theodore C. Shove* it is reversed, and the cause remanded with directions to re-enter the judgment so it will not extend the time for *Mrs. Shove* to redeem, but will give appellant the relief he is entitled to against *Theodore C. Shove* as indicated in this opinion. No costs in this court are allowed to respondent *Ellen E. B. Shove*. Full costs are allowed appellant against *Theodore C. Shove*, except that the amount for printing is limited to fifty pages.

ENDRESS, Appellant, vs. SHOVE and wife, imp., Respondents.

March 23 — April 9, 1901.

Appeal: Findings: Questions reviewed: Evidence.

1. The rule that a finding of facts by a trial court will not be disturbed on appeal unless it is contrary to the clear preponderance of the evidence is unbending, even though the trial judge, in rendering his opinion, stated that his impressions on the trial were different, and that he changed his mind upon taking time to study the case.
2. There is a wide range between mere preponderance of evidence and that preponderance of evidence necessary to overcome the decision of a trial judge on controverted questions of fact; and where the evidence on a certain issue is extensive and conflicting and the appellate court cannot say that the preponderance of the evidence against the finding is so great that it could not be easily overcome by the appearance of the witnesses and other aids of the trial court not available on appeal, the finding will be sustained.

APPEAL from a judgment of the circuit court for Door county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

Action under sec. 3347, Stats. 1898, to realize on a pledge of two life insurance policies on the life of defendant *Theodore C. Shove*, which were assigned to plaintiff in 1886 as

collateral security for *Mr. Shove's* note of $2,000. His wife and the insurance companies were joined with him as defendants. He answered separately, alleging as a defense and also as a counterclaim the following: From June 1, 1884, down to and inclusive of April 12, 1892, said defendant and plaintiff's son, Adolph J. Endress, were associates in banking business. At the last date mentioned, and for some time theretofore, the enterprise was in a corporation known as the T. C. Shove Banking Company. During the time of such association Adolph J. Endress was general agent for plaintiff in all of his business affairs. They daily consulted together in regard to such business. On the date last named the banking corporation, by reason of its insolvency, made an assignment for the benefit of creditors, in consequence of which defendant lost all his property. On the day of the assignment it was agreed between plaintiff, acting by his son Adolph, and said defendant, that the latter should give to the former a note for $4,000 secured by a real-estate mortgage, in payment of the $2,000 note mentioned in the complaint and to secure a new loan of $2,000, the old note and the collateral to be delivered to defendant upon the execution and delivery of the new note and security, so that the collateral could be assigned to *Mrs. Shove.* Such agreement was fully carried out by *Mr. Shove, Mrs. Shove* joining in the mortgage on the real estate. The note and mortgage were delivered to Adolph J. Endress. He delivered the same to plaintiff, but the latter refused to comply with his part of the agreement. He has kept both the new note and security and the old note and security, and is endeavoring to enforce payment of such old note by realizing on the collateral in this case. Appropriate relief was prayed for.

Plaintiff put the allegations of the counterclaim in issue. On the trial the evidence showed the following: Plaintiff at the time of the transaction in controversy was about

seventy and *Mr. Shove* about fifty-six years of age. *Mr. Shove* had been engaged in the banking business for upwards of thirty years. In 1884 he associated with him Adolph J. Endress, who had theretofore for some time been in his employ. At the time the business association commenced young Endress was about twenty-one years of age. Plaintiff furnished capital for his son to the amount of about $10,000, taking the son's note therefor, guaranteed by *Mr. Shove.* In July after the partnership was formed the business of the bank was put into a corporation under the name of the T. C. Shove Banking Company, $10,000 of the capital stock being issued to young Endress as his portion thereof. June 9, 1886, *Mr. Shove* borrowed $2,000 of plaintiff, giving therefor his promissory note secured by an assignment of the policies in suit. June 1, 1888, the note was renewed. The new note and the policies are those mentioned in the complaint. The bank made an assignment for the benefit of creditors in 1892, at which time a note of $4,000, secured by a mortgage on the bank building belonging to *Mr. Shove*, was agreed to be given to plaintiff, the business in his behalf being done by his son. The agreement was consummated April 14, 1892. In the meantime the real estate was attached in a suit commenced by one Hubbard against *Mr. Shove* to recover several thousand dollars, the claim being so large as to render the mortgage security of uncertain value. When the agreement was made *Mr. Shove* was in a very anxious state of mind as to the future of himself and family. It was to him a day of great excitement because of the impending assignment of the bank and the probable effect thereof upon his affairs. On the day the agreement was made, either by the suggestion of *Mr. Shove* or the voluntary act of Adolph J. Endress, $2,000 in currency and $1,155 in value of government bonds, part of the assets of the bank, were taken therefrom and delivered to *Mr. Shove* at the lawyer's office where the assignment papers were in

process of preparation. When the note and mortgage were delivered to Adolph, *Mr. Shove* was sick in bed. The assets of the bank, taken as aforesaid, were subsequently returned. The testimony as to the taking thereof is conflicting. *Mr. Shove* laid the blame to young Endress, claiming that he, *Shove*, was so angry with the young man for perpetrating the act that he threatened to have him arrested and that it it caused strained relations between them. Mr. Endress claimed that he took the money and bonds from the bank against his own judgment, by the express direction of *Mr. Shove*. The evidence is undisputed that the property taken was delivered to *Mr. Shove*, was in his possession when or about the time the alleged agreement was made, and that on the evening of the day of the taking *Mr. Shove* divided the subject thereof, giving part to young Endress and keeping the balance, and that three or four days elapsed before the property was delivered to the assignee of the bank.

Mr. Shove's version of the agreement as to the note and mortgage for $4,000 was substantially according to the allegations of his answer. He was corroborated in that by *Mrs. Shove*. She said that Mr. Endress and her husband came to her to obtain her signature to the mortgage, and that the agreement in regard to the matter was then stated, and she was promised that if she would sign the mortgage the insurance policies would be delivered so they could be assigned to her in accordance with a previous assignment thereof. In explanation of the testimony as to a previous assignment, an instrument was introduced in evidence showing that such policies and several others were assigned to *Mrs. Shove* in 1891, and that young Endress was a subscribing witness. He testified that he had no recollection of any such paper, yet the evidence tended to show that he not only witnessed but had personal charge of it and sealed it up in the condition in which it was found in the bank.

Mr. Endress's version of the agreement as to the mortgage

was that *Mr. Shove* proposed to him that he should pay his father all he could of the $10,000 note and that *Mr. Shove* should secure the balance; that it was considered that such balance would be about $4,000 and that the note and mortgage were delivered accordingly; that the giving thereof was the voluntary act of *Mr. Shove;* that he suggested it during the time of great excitement aforesaid; that it was made up that he, Endress, should pay his father some $6,000 upon the guaranteed note and that *Mr. Shove* should secure the balance of the principal; that upon such understanding being arrived at, *Mr. Shove* attended personally to having the mortgage drawn, and that the witness, pursuant to the understanding, turned over to his father, as payment upon the $10,000 note, all the property he possessed, amounting to about $6,000.

The following facts in evidence are referred to as corroborative of *Mr. Shove's* version of the agreement as to the giving of the note and mortgage: $2,000 was indorsed on the $4,000 note a short time after its delivery without any actual payment being made. A short time after such delivery the policies were demanded on behalf of *Mr. Shove*, at which time plaintiff did not refuse to comply therewith but said he would do so when his son arrived, who was then absent. The $10,000 guaranteed note was not taken up or canceled at the time the $4,000 note was delivered, nor thereafter. The insurance policies, if handled adversely to *Mr. Shove*, were of little value as security for the $2,000 note. When the verbal contract to give the mortgage was made, the real estate to be mortgaged was good security for $4,000. On the other hand the evidence showed or tended to show that after the demand for the policies was made, nothing more was said about them till the commencement of this action. They, together with the $2,000 note, were allowed to remain in plaintiff's possession without objection. In 1892 *Mr. Shove* claimed that the note and mortgage were

given on account of the guaranty of the $10,000 note, and made no claim to the contrary till the commencement of this action. *Mrs. Shove* claimed in 1892 that she had no knowledge of the purpose of the note and mortgage when they were given. The indorsement of $2,000 was made after it was known that the value of the real estate was largely covered by the Hubbard attachment. Plaintiff's son knew that fact when he accepted the mortgage, but was informed by *Mr. Shove* that the attachment would not hold. Adolph turned over to his father on April 12, 1892, all property possessed by him, reducing the amount due upon the note to about $4,000. The indorsement of the $2,000 was explained by *Mr. Shove* as having been made because respondent refused to carry out the agreement to loan him that sum. He explained the purpose he had in view in obtaining the loan by saying that the circumstances in which he was situated suggested that it was a prudent thing to do to make some provision for the future needs of his family. The indorsement was explained by appellant as having been made at the request of *Mr. Shove* to leave him a sufficient interest in the mortgaged property to secure a creditor by the name of Rahr, who was not called to testify upon the trial. Appellant said he looked over the property turned out by his son and concluded that he could make $2,000 out of six lots in Rhinelander, taken for $1,500, and in that view he consented to *Mr. Shove's* request to indorse the $2,000 upon the note so he could secure Mr. Rahr. The lots were purchased by young Endress, shortly before they were turned out to appellant, for $1,300. The evidence was to the effect that if the note and mortgage were given for the purpose testified to by appellant, or that testified to by respondent, no effort was made to deal with exactness as regards the amount due upon the outstanding notes.

The trial court found the facts substantially as alleged in *Mr. Shove's* counterclaim, and rendered judgment accordingly.

For the appellant there was a brief by *Nash & Nash*, and oral argument by *L. J. Nash*.

For the respondents the cause was submitted on the brief of *Greene, Fairchild, North & Parker*.

MARSHALL, J. The sole question raised on this appeal is, Are the findings of fact contrary to the clear preponderance of the evidence? Generally, in determining such a question, the circumstance that a trial judge has the benefit of the personal appearance of witnesses while giving their testimony, in determining the weight that should be given thereto, is regarded as an important factor. That is largely the reason why a reversal of his conclusion on a question of fact is not deemed proper merely because the evidence preserved in the record seems to preponderate that way. Such preponderance is not effective to call for such a result unless it is sufficiently manifest and convincing to overcome any probable effect, upon the judicial mind, of the appearance of the witnesses or other aids, which only the trial court can have, in discovering the truth. It is said that we should not adhere to that rule in the instance under consideration, because the learned circuit judge, in rendering his opinion, stated that his impressions on the trial were in favor of plaintiff, and that he changed his mind upon taking time to study the case. We are unable to say from that, that the personal appearance and conduct of the witnesses were not factors in reaching the final conclusion. It is more reasonable to say that the study which the trial judge gave the case enabled him to more accurately weigh what the witnesses said in the light of all the circumstances developed on the trial and the personal appearance of the witnesses, than he did as the trial progressed. So the findings of fact before us must be tested by the usual rule governing cases tried by the court. It is not improbable that the system requiring that fails to reach a just result in some cases. No

system of jurisprudence ever devised by human agency has, nor would any that could be so devised, come up to the standard of absolute perfection. All that can be done is to administer justice along the lines which experience teaches are most likely to give a full measure of justice to the litigants. Having done that, the result must stand as the infallible truth, for there is no tribunal that can legally question it. The rule to which we have referred, governing this case, is unbending. It admits of no exception where right rules of law are applied to the evidence, and no complaint of that character is made here.

The evidence in the record has been carefully examined and weighed, giving due significance, it is believed, to each and every circumstance established thereby. If the story told by appellant's son is correct, great injustice has been done to him. If the story told by respondent *Theodore C. Shove*, which the court believed in the main, is true, the judgment is right. There are circumstances that strongly corroborate the testimony of young Endress, and circumstances that strongly discredit it. The same is true as to the testimony of *Mr. Shove*. The corroborating and discrediting circumstances as to the testimony of each are numerous. The weight of one, as to pointing to where the truth lies, cannot be determined without balancing it with others, and then the preponderating weight is not so significant but that it might be overcome readily by the aids which the trial court had, that have not and cannot come to this court. That states the condition of mind in which we are left as a result of an industrious study of the evidence. It does not permit a disturbance of the judgment appealed from. It is useless to discuss the evidence in detail. It must be well understood by the profession that although in theory there is a new trial here on questions of fact, where the trial below was by the court and a bill of exceptions containing the evidence is preserved to support

exceptions to the findings, the principle has become so firmly established, that such findings must be regarded as verities in the case unless overcome by a clear preponderance of the evidence, that such trial is in fact far different from an original trial. The presumptions indulged in, in favor of such findings, are not easily overcome, so it may happen — we venture to say it does happen in some cases — that a judgment of affirmance is rendered where a reversal would occur if such presumptions were left entirely out of consideration. That cannot be helped. The judicial policy of the court and its interpretation of the statute governing the subject are firmly intrenched in our system. They cannot be varied in this case even if we were to say that the evidence in the record, looking at that alone, impresses us contrary to the conclusions reached by the trial court. There would still be left that insurmountable difficulty to a reversal,— absence of such clear preponderance of evidence against the findings as to convince us to a reasonable certainty that the trial judge decided wrong. It must not be lost sight of in this class of cases that there is a wide range between mere preponderance of evidence and that preponderance necessary to overcome the decision of a trial judge on controverted questions of fact. We cannot find that clear preponderence of evidence in this case.

By the Court.— The judgment appealed from is affirmed.

OLSON, Respondent, vs. SAWYER-GOODMAN COMPANY, Appellant.

110 149
s58 LRA 648
56 LRA 875n
57 LRA 341n

March 23 — April 9, 1901.

Gaming contracts: Immaterial error.

1. Plaintiff worked in defendant's lumber camp, and played poker with its other employees including R., who was its time-keeper and bookkeeper, and who also had charge of a supply department maintained

in its camp. There was no money in the camp, and R. agreed to let the winners have goods out of defendant's store equal to the amount of their winnings, and charge the same to the losers, which was done, the plan of operating being carried on with the knowledge and acquiescence of defendant's foreman. Plaintiff having brought action for wages due, the defendant claimed the right to apply thereon the value of goods charged against him by R. *Held*, that the whole scheme was contrary to the statutes and public policy as well, and that plaintiff was entitled to recover in full the wages due him, less the value of goods that had been delivered under said agreement by his express direction.

2. A mistake of the trial court in the entry of judgment, which is against the respondent, is not prejudicial to the appellant, and affords no ground for reversal.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

The plaintiff sues to recover $166 for services performed in one of defendant's lumber camps. The answer admitted the performance of the labor, alleged an accounting which showed the balance due plaintiff to be $84.52, the issuing of a time check in payment of that amount, and the subsequent payment of $3.35. There was a tender of judgment for $81.87. The case was tried in justice's court, and taken to the circuit court on plaintiff's appeal. A jury was waived, and the case was tried by the court. On May 17, 1898, the court filed a written decision in favor of plaintiff. The defendant requested certain findings which were refused. Exception was filed to the court's decision and to the refusal of the court to find as requested. A judgment was directed for plaintiff for the sum of $136.67 and costs, which was duly entered, and from which this appeal is taken by defendant.

For the appellant the cause was submitted on the brief of *Quinlan & Daily.*

James H. McGillan, for the respondent.

BARDEEN, J. It is admitted that the plaintiff worked 166 days for the defendant at $1 per day. It is also admitted

by plaintiff that during that time he personally received goods and supplies from the company amounting to $12.53, and that the defendant paid his railroad fare home, and for other expenses amounting to $3.35. The defendant claims to be entitled to an additional credit of $65.40, arising out of the following circumstances: The defendant kept a supply department in its camp, under the charge of one Riley, who was also defendant's timekeeper and bookkeeper. A number of the men amused themselves playing poker. A banker kept account of the game, and at the end of each game he would report who had lost and won, and the amount. There was no money in the camp with which these balances could be liquidated, so it was agreed between the players that the debts should be paid from the camp store; that is, the winner could go to the store and get goods to the amount he had won, and have it charged to the loser. Instead of drawing goods at the end of each game and squaring accounts, the banker, in the presence of each player, would report the debits and credits to Riley, who kept a private memorandum thereof. If at any time a party who had credit on this account wanted anything, Riley would give it to him from the company's goods, and charge it to some person against whom there was a debit; and, if the amount drawn was greater than the debit against any one loser, it would be distributed among several, and would then be entered on the company's books as goods obtained by the several losers. This arrangement was made between the men and Riley before the games commenced in the fall, and was also known to the foreman of the camp. During the winter there was charged against plaintiff on store account $81.38. Of this amount, $12.53 was taken by plaintiff for his personal use, and $7.40 was delivered to winners on the personal order of plaintiff. The remainder was for goods turned over to the various winners pursuant

to the original agreement at various times during the winter, and without any express direction from plaintiff. Riley was one of the gamblers, and, as agent for the defendant, assented to the arrangements before stated. The effect of this agreement was that defendant, by Riley, stood as banker for each man to the amount of wages earned, and agreed to turn the same over, or such portion as was lost, to the winners at the games. This was to be done pursuant to the arrangement made between the men and Riley before the games were commenced. The trial court held that this agreement was illegal and void, as being promotive of gambling, and gave no authority to Riley to deliver goods to winners and charge them to the loser; that, when the men were present and got the goods themselves, they were properly chargeable to them, regardless of what they did with them. Upon this theory the plaintiff was held chargeable with the goods to the amount of $7.40, which were turned over to winners in his presence and under his direction. The decision of the trial court seems to have been founded upon a correct appreciation of our statutes condemning gambling, and all agreements and transactions based thereon or growing out of the same. These statutes are sufficiently referred to and discussed by the present chief justice in the opinion written in *Stoddard v. Burt*, 75 Wis. 107. Note, also, *Schoenberg v. Adler*, 105 Wis. 645. The whole scheme was illegal, void, and contrary to the statutes and to public policy as well. The plan of operations was known to defendant's foreman, and carried on with his knowledge and acquiescence. Except for the agreement as to delivery of goods and the plan of shifting credits, it is not at all likely that the games would have been continued. We are entirely satisfied with the conclusion of the trial court, and must therefore affirm the judgment. The court found that plaintiff's wages amounted to $166, and that his total debits

were $23.33, and directed judgment for $136.67,—a mistake of $6 against plaintiff. Judgment was entered as directed, and the mistake, not being prejudical to defendant, affords no ground for complaint on its part.

By the Court.—The judgment is affirmed.

WATERMOLEN, Administrator, Appellant, vs. THE FOX RIVER ELECTRIC RAILWAY & POWER COMPANY, Respondent.

110 153
110 *355

110 153
116 *646

March 23—April 9, 1901.

Street railways: Negligence: Injuries to traveler: Court and jury: Contributory negligence: Comparative negligence: "Gross negligence."

1. It appeared, among other things, that the driver of a wagon, who had plain view for a distance of 300 to 400 feet of an electric car approaching at a speed of from eight to twelve miles an hour, which was shown to be a usual rate of speed, when within 130 feet of the car, hurriedly attempted to cross in front thereof, and although the motorman immediately attempted to stop the car, a collision occurred. *Held*, that the driver was guilty of contributory negligence as a matter of law.
2. While travelers on foot, by team, and by electric car may lawfully use the public highway, the purpose of expedition to be accomplished by the electric railway, and the character and weight of the vehicles necessary therefor, must result in deference from the foot traveler and the teamster to the electric car, and in an action to recover for an injury due to a collision the question is not whether the plaintiff had a right to be in the course of defendant's car, but whether he was negligent in being in that position.
3. The doctrine of supervening or comparative negligence has no place in the jurisprudence of Wisconsin.
4. The expression "gross negligence" as used by Wisconsin courts includes no degree of mere carelessness or inadvertence, however remote from the care customarily used by either the ordinarily careful man or by the exceptionally careless one, unless accompanied by intent, either actual or constructive, to cause the injury, or unless the conduct causing the injury evinces a total disregard

for the safety of persons or property, so as to be little less than intentional wrong.

5. Where a motorman approaching a crossing with his car running at a customary speed of from eight to twelve miles an hour sees a driver of a wagon attempt to cross in front of his car when it is within 130 feet of the wagon, and immediately applies the brakes and attempts to stop the car, which is so nearly effected that the car stops from four to ten feet after collision, he is not guilty of gross negligence authorizing a recovery independent of the contributory negligence of the driver.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

On February 12, 1900, Frank Watermolen, plaintiff's intestate, twenty-one years of age, in full possession of all his faculties, and of ordinary intelligence, was engaged in hauling ice in the city of Green Bay. At the time in question he was driving the last of three empty ice wagons westward on the north side of Main street, a paved thoroughfare, in the middle of which the defendant maintained a single railway track. He was traveling from a considerable distance eastward towards a point where an opening had been made in the sidewalk on the south side of the street, to pass therefrom down to the river to obtain ice. The street westward from that point was in plain view for a distance of 300 or 400 feet. As the first team reached a point opposite this break in the sidewalk, where it was customary for the ice teams to enter, a car of the defendant was approaching, in plain sight, somewhere about 300 feet to the westward, coming towards them at a rate variously estimated from eight to twelve miles an hour. The first driver turned and crossed the track, followed closely by the driver of the second wagon, during all of which time the approach of the car had continued until it had reached a point estimated by different witnesses, with more or less certainty, all the way from twenty feet to 130 feet west of the crossing point. The decedent, with this car plain before his eyes, thereupon,

hurrying as much as possible, turned to the left to pass the crossing in front of it, which he failed to accomplish completely. The rear end of his ice wagon was struck by the car, and he thrown to the ground, and, either by the fall or by subsequent contact with his wagon as the horses sprung forward, was killed. It is undisputed that, as soon as the purpose to attempt the crossing became apparent, efforts to stop the car and prevent collision were made by the motorman, which were so nearly effective that the car stopped within a very few feet — four to ten — of the contact. Each of the wagon racks was sixteen feet long, and, with the horses, about twenty-seven feet long. The speed of the car is shown to have been usual and customary at the place in question. At the close of the evidence the trial court directed a verdict for the defendant on the ground of contributory negligence, upon which judgment for the defendant was entered, from which plaintiff appeals.

John F. Watermolen, for the appellant.

For the respondent there was a brief by *Greene, Fairchild, North & Parker*, and oral argument by *H. O. Fairchild.*

DODGE, J. The general facts of this case, to which are to be applied the rules of law governing the rights of the parties, are very simple, notwithstanding much conflict of evidence as to minor details, such as the distance away of the car when deceased attempted to make the crossing, its speed, and the exact place of the attempt. There is no dispute whatever that for a considerable time the car had been plain before the decedent's vision, and, whatever its exact location or speed, they were necessarily known to him. That location and speed were such that although he hastened his team to the utmost, and although the speed of the car, instead of increasing, was substantially diminished after he started to cross, collision in fact occurred. In other words, the conditions were such that he could not, without

haste, cross in safety, unless those conditions materially changed. With such knowledge decedent placed himself within the peril voluntarily and needlessly; for he was under no compulsion, by reason either of conduct of his team or of momentum, and could have stopped easily and without danger, at any moment before actually placing himself upon the track. That such conduct justifies no inference or conclusion other than negligence is now too firmly established to permit discussion, or warrant extended restatement of reasons. *Haetsch v. C. & N. W. R. Co.* 87 Wis. 304, 310; *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 465; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593. In a situation at all doubtful, the assumption of so serious a hazard upon the chances of the comparative speed of vehicle and train, when the alternative inconvenience of a brief delay is so slight, is not the part of ordinary care, and the event is at the traveler's own risk.

Various circumstances in this case enforce the conviction that plaintiff's intestate well understood that he was incurring an imminent peril, and that his chance was a doubtful if not desperate one. The witnesses who place the car at the greatest distance were the drivers of the two teams which preceded the deceased, and it appears that they deemed themselves in danger, and exerted themselves vehemently to "hustle" their teams across, although they had the advantage over him, the one of about sixty feet, and the other of about thirty. The first teamster locates the car about 270 or 280 feet away when he attempted to cross, and estimates its speed at twelve miles per hour, or four times the speed of the teams, which would advance the car some 240 feet while the two teams were covering the sixty feet necessary to carry them across the track, and bring it within thirty or forty feet of the point of collision when deceased attempted to cross. While these figures are only approxi-

mate, as are all the other estimates of speed and distance, they serve to show the well-nigh impossibility of this same witness's estimate that when deceased attempted the crossing the car was still half-way to a certain curve, or 130 feet distant, and tend strongly to confirm the estimate of all the other witnesses that when decedent's horses reached the track the car was only about twenty feet away. These considerations are, however, only makeweights. The simple situation first outlined justifies the conclusion of contributory negligence, and renders any other unwarranted. The trial court rightly exercised judicial function and authority in so deciding, and in withdrawing the question from the jury.

In appellant's brief we are favored with a discussion of the relative rights and rights of way of the teamster and the electric car upon a street. This subject has just been treated sufficiently in *Tesch v. Milwaukee E. R. & L. Co., supra.* There it was pointed out that travel on foot, by team, and by car are all lawful means of using the highway by the public for whom it exists; that the privilege of running at high rate of speed, on fixed tracks, cars of much size, of which the momentum is not easily controlled, is accorded owners thereof, not for their own private benefit, but to meet the needs of large numbers of the public, each of whom has the same right to consideration as has he who would pass on foot or in his own vehicle; and that from the very purpose of expedition to be accomplished, and the character and weight of the vehicles necessary thereto, must result deference from the foot passenger or the teamster to the electric street car. That discussion is, however, wholly irrelevant to the question whether the conduct of plaintiff's intestate precludes recovery. That question must be answered from considerations of due care, and not of mere right. One may be entirely within his strict rights when placing himself within the peril of another's negligence, and yet be so clearly

negligent in so doing that he cannot recover. Wrong or negligence can make its perpetrator liable only for such damages as could not be avoided by due care of the injured party. A traveler on a sidewalk, who knowingly and needlessly walks into the peril of a wall which, by negligence of the owner, is tottering to its fall, may be wholly within his right, while the owner's conduct is wrongful, and yet be so clearly guilty of contributory negligence that he must suffer the result without remedy. The question is not whether the deceased had a right to be in the course of defendant's car, but whether he was negligent. *Brown v. C. & N. W. R. Co.* 109 Wis. 384.

2. The finding of contributory negligence relieves us from the necessity of considering whether any mere negligence is proved against the defendant. It renders proper a verdict for defendant, even though its motorman may have been guilty of some want of ordinary care, and that, too, even after discovering danger of collision; for the doctrine of supervening or comparative negligence has no place in our jurisprudence. *Johnson v. Superior R. T. R. Co.* 91 Wis. 233; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593. It is, however, urged that the evidence tends to disclose *gross* negligence on the part of the motorman, and that, under numerous decisions of this and other courts, liability results therefrom notwithstanding contributory negligence. That such rule has often been announced by this court, though less often found applicable, is beyond question; but its statement is extremely misleading, unless the meaning of "gross negligence," as used by this court, is fully understood and carefully distinguished from its meaning in those courts which recognize the doctrine of comparative negligence, and the efficacy of a higher degree of mere negligence in defendant to overcome the effect of plaintiff's negligence of less degree. The exact significance of the expression "gross negligence" in this court has recently been defined in several carefully con-

sidered cases. *Lockwood v. Belle City St. R. Co.* 92 Wis. 97; *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333. From those decisions it is obvious that no degree of mere carelessness or inadvertence, however remote from the care customarily used either by the ordinarily careful man or by the exceptionally careless one, constitutes gross negligence with us, unless accompanied by what in the *Bolin Case* is described as intent, either actual or constructive, to cause injury, or, as the same idea is phrased in the *Schug Case*, unless the conduct "evinces a total disregard for the safety of persons or property, and is but little less than intentional wrong." Of such conduct the record before us presents no intimation. The only direct evidence of the motorman's management of his car after discovery of peril to the deceased is that of himself and of Anderson, the only passenger, who both testify, as witnesses for the plaintiff, that immediately deceased drove onto the track the brake was put in operation, and efforts made to stop the car, which were so nearly effective that it did come to a complete stop within a very few feet after the collision, and had so nearly stopped before that the half-inch strips of which the vestibule was built were hardly at all broken, and the glass forming its upper part not at all. Of course, the motorman might, consistently with even ordinary care, assume that a teamster would not drive onto the track in a position of peril until a purpose to do so was rendered apparent. *Cawley v. La Crosse City R. Co.* 106 Wis. 239, 242; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593. So far as appears, deceased might have stopped his horses the moment before they reached the tracks, and the motorman might well have expected it. The practice of stopping teams at this point for cars to pass was not unusual, as testified by the other teamster. The conduct of the motorman, as soon as the peril became apparent, does not justify any inference either of intent to collide with decedent's wagon, or of

total disregard for the latter's safety, "but little less than intentional wrong."

Under rules of law now too firmly established to permit reconsideration, we must hold that the trial court rightly decided that no recovery by plaintiff was warranted by the evidence, though accorded the most favorable construction and the utmost reasonable inferences in his behalf, and therefore properly directed verdict for defendant.

By the Court.— Judgment affirmed.

VIELLESSE, Respondent, vs. THE CITY OF GREEN BAY, Appellant.

March 23 — April 9, 1901.

Municipal corporations: Defective sidewalks: Negligence: Personal injuries: Appeal: Evidence: New trial: Notice of defect: Expert testimony: Exhibits: Prejudicial error.

1. In an action against a city for personal injuries it is *held*, upon the evidence, that there was no abuse of discretion in refusing a new trial on the ground that the verdict in plaintiff's favor was contrary to the evidence.
2. In such an action it is not error to admit testimony as to whether the plaintiff appeared to suffer pain.
3. In an action against a city for injuries sustained by reason of a defective sidewalk, evidence that planks in the walk were rotten for some distance on either side of the place where the injury occurred is admissible to show that the city had notice of the bad condition of the walk, and if defendant's counsel desires that such evidence should be more restricted, he should request an instruction to that effect.
4. In a suit for injuries sustained by stepping into a hole or through a rotten place in a plank in a sidewalk, the admission of expert testimony as to the probability of such accident causing certain injuries, and as to whether there was a probability of such injuries being permanent, is *held* not to have been a material error where the court charged that, if the evidence satisfied the jury to a "rea-

sonable certainty," the plaintiff was entitled to recover, and that they might consider, in fixing the amount of damages, what amount of physical and mental suffering it was "reasonably certain" plaintiff would endure in consequence of the injury, since the jury could not have been misled by such testimony.

5. Where the hole in the sidewalk and its rotten condition are conclusively established in such a case, it is not prejudicial error to allow a witness to exhibit to the jury pieces of the plank where the hole was, for the purpose of showing its condition. *Stewart v. Everts*, 76 Wis. 35, distinguished.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Sol. P. Huntington*, and for the respondent on that of *Wigman, Martin & Martin.*

CASSODAY, C. J. This is an action to recover damages for personal injuries sustained by the plaintiff by reason of stepping into a hole or through a rotten place in the plank sidewalk described, elevated about twelve inches above the ground, and from which the plaintiff was unable to extricate her foot until she had called for help, which came and cut the hole larger. The accident occurred between seven and eight o'clock on the evening of August 10, 1898. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff, and assessed her damages at $700. The defendant moved to set aside the verdict as being contrary to the evidence. The contention in support of that motion seems to be sufficiently answered by the opinion of the learned trial judge in denying the same. He said, among other things:

"The testimony left no doubt as to the insufficiency of the sidewalk, by reason of a dangerous hole in it. The testimony certainly warranted the jury in finding that the plaintiff stepped into the hole. Aside from her own testimony, several witnesses found her with her leg through the hole, and so caught that an ax was used to enlarge the hole before

her leg could be released. The contention of the city is that the plaintiff was not injured at all, or, if injured, not to an extent that justifies the verdict rendered. There is no pretense of any external injury. An examination of the plaintiff by two physicians resulted in their discovering no evidence of internal injury, except the plaintiff's own statements as to her feelings and conditions. The physicians admit that she may suffer as she claims without there being any external evidence of it, that such an accident as she describes might cause such injury as she complains of, and that if she suffered as she claims, and was in the condition she describes at the time of trial, her injury would be, to some extent, permanent. The fact of the injury rests on the plaintiff's testimony. It is earnestly contended that that testimony is false and will not support the verdict. I do not think there is anything necessarily improbable or inherently false in the essential features of the plaintiff's story. Eliminating from the case all testimony directly contradicting her and all testimony tending to establish impeaching circumstances, and her statement would certainly support the verdict. As to most of the impeaching circumstances there is a conflict of testimony, which would warrant the jury in deciding either for or against the existence of the fact. I have followed the testimony and arguments of defendant's counsel both before the jury and on this motion very closely. I am not convinced that the testimony is not sufficient to support the verdict."

We cannot say that there was any abuse of discretion in refusing a new trial upon the ground stated.

2. There was no error in admitting testimony as to whether the plaintiff appeared to be suffering pain. The admission of such testimony has frequently been sanctioned by this court. *Keller v. Gilman*, 93 Wis. 9, 11, and cases there cited.

3. Error is assigned because a witness was permitted to testify that: "As a general rule, that sidewalk on that side, as far as the walk runs lengthwise, was in a very poor condition. This was at a point where the plank run lengthwise in that block from the alley north to Cedar street." It is conceded that such testimony was admissible as tending to show that the officials of the city had notice of the bad

condition of the walk, but it is claimed that its effect is shown to have been limited to such question of notice. *Shaw v. Sun Prairie*, 74 Wis. 105, 108; *Propsom v. Leatham*, 80 Wis. 608; *Barrett v. Hammond*, 87 Wis. 658; *Grimm v. Washburn*, 100 Wis. 229; *Conrad v. Ellington*, 104 Wis. 371. The admission of such evidence was justified by these authorities. If the defendant's counsel desired that such evidence should be more restricted, he should have requested an instruction to that effect.

4. Error is assigned because the court allowed the medical experts, in answer to hypothetical questions, to testify as to the probability or likelihood of such a fall wrenching or injuring the back, and whether a very severe wrench would strain the muscles and ligaments, and even the nervous system, without any external manifestation on that part of the body, and whether there was a probability of such injury being permanent. Some of these questions come very near, if they do not cross, the border line. Verdicts are not to be based upon conjectural evidence. Thus, it has been held by this court that:

"Damages as for a permanent injury should not be allowed unless the permanency thereof is *reasonably certain* from the evidence, and the jury should be so instructed; but it was no error to admit a physician's opinion that it was *reasonably probable* that there would be no complete recovery." *Block v. Milwaukee St. R. Co.* 89 Wis. 371.

"The rule is well settled that, in order to recover damages on the ground that an injury is permanent, the evidence must show such permanency with reasonable certainty." *Collins v. Janesville*, 99 Wis. 465.

The charge to the jury on the subject seems to have been clear and explicit. It is there said:

"Now, if the testimony shows that her injury, if she has suffered any, is permanent — that is, it will continue in the future — then you may also consider what amount of physical and mental suffering it is *reasonably certain* she will endure in consequence of it, and what will be a reasonable compensation not only for the past, but for the future."

We perceive no error in such charge. In another connection the court charged the jury: "If the testimony satisfies you to a reasonable certainty of the existence of all these facts, then the plaintiff is entitled to recover." With such instructions, we do not think the jury could have been misled by the testimony referred to.

5. We perceive no prejudicial error in allowing a witness to exhibit to the jury pieces of the plank where the hole was, for the purpose of showing its condition, as the hole in the walk and its rotten condition are conclusively established. The case is distinguishable from *Stewart v. Everts*, 76 Wis. 35.

Other errors are assigned, but they do not seem to be of sufficient importance to call for special consideration.

By the Court.—The judgment of the circuit court is affirmed.

SCOTT and another, Appellants, vs. CHRISTIANSON and wife, imp., Repondents.

March 23 — April 9, 1901.

Mechanics' liens: Subcontractors: Claim for lien: Notice to owner: "Material facts."

1. The name of the original contractor, and the giving of notice in writing to the owner of the property affected by a claim for a subcontractor's lien, required by sec. 3315, Stats. 1898, are "material facts in relation thereto," and therefore, under sec. 3320, Stats. 1898, must be stated in the claim for lien or it is insufficient.

[2. Whether the notice of claim for a subcontractor's lien, if it contains the facts required under sec. 3320, Stats. 1898, to be stated in the claim for lien, and has been properly filed, may serve the purpose of such a claim, not determined.]

3. A mechanic's lien being purely a statutory right, it must be pursued as the statute directs or it fails.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action to foreclose a subcontractor's lien upon a dwelling house. The material facts were not in dispute. In 1896 the defendant Haupert built a house for the defendant *John Christianson* under a written contract made April 20, 1896, by which he was to be paid $585 for building a house; the same to be completed June 5, 1896. Haupert completed the house June 18, 1896, and *Christianson* accepted the same and paid the entire contract price. Haupert made no contract with the plaintiffs to furnish materials for the house, but procured the lumber and materials necessary for the house during the months of April, May, and June from the plaintiffs, to the amount of $231.26, which the plaintiffs charged to him upon open account, and the same was not paid for. July 9, 1896, at the request of *Christianson*, Haupert ordered for the plaintiffs one cellar sash and 350 feet of cull lumber for a sidewalk, amounting to $2.35, which articles were delivered to *Christianson* on the same day. On the 7th of September, 1896, the plaintiffs served upon *Christianson* a written notice of their claim for the lien, as follows:

"Notice is hereby given to *John Christianson*, the owner of the property to be affected by the lien herein mentioned, that the undersigned, *John Scott* and *James Taylor*, partners under firm name of Scott & Taylor, subcontractor of Peter Haupert, principal contractor for performing the work and labor and furnishing the materials hereinafter mentioned, claim the lien given by chapter 143 of the Revised Statutes of Wisconsin and the acts amendatory thereof, upon the premises and lands hereinafter particularly described, and upon the dwelling house thereon situate; that the undersigned were employed by said Peter Haupert, principal contractor, to perform the work and labor, and to furnish the materials hereinafter particularly stated, upon the property hereinafter described, and the dwelling house situated thereon; that the undersigned have performed such work and labor and furnished such materials, pursuant to

such employment, upon the said property and dwelling house situated thereon; that the following is a particular statement of said work and labor so performed and of said materials furnished by the undersigned pursuant to such employment: Materials furnished as per statement annexed, and which is a part of this lien, amounting to the sum of two hundred thirty-three and $\frac{61}{100}$ dollars. The property to be affected by said lien is described as follows, to wit: No. 1608 4 St. East, to wit, lot 5, block 54, Lake Shore division to the city of Ashland, Ashland Co., Wis.

"Dated September 7th, 1896. SCOTT & TAYLOR.

"To *John Christianson*, Owner."

On December 30, 1896, the plaintiffs filed a copy of the foregoing notice with the clerk of the circuit court, but filed no other claim for lien. The court found that the plaintiffs had never filed a claim for the lien as required by the statute, and hence denied a judgment for lien, and dismissed the action as against *Christianson* and his wife, but rendered a personal judgment against Haupert for the full amount of materials sold to him by the plaintiffs, and the plaintiffs appeal.

For the appellants there were briefs by *Sanborn, Gleason & Sleight*, and oral argument by *W. S. Cate*. To the point that the claim filed complied essentially with the statute, they cited *White v. Dumpke*, 45 Wis. 454; *Jarvis-C. M. T. Co. v. Sutton*, 46 Kan. 166; *Cahill, C. & Co. v. Ely*, 55 Mo. App. 102; *Drexel v. Richards*, 50 Neb. 509; *McCoy v. Quick*, 30 Wis. 521; *Witte v. Meyer*, 11 Wis. 296; *Sherry v. Schraage*, 48 Wis. 93; *Green v. Williams*, 19 L. R. A. 478.

For the respondents there was a brief by *George H. McCloud*, and oral argument by *W. M. Tomkins*.

WINSLOW, J. The trial court denied judgment for a mechanic's lien because no claim was filed therefor which complied with the statute. In this ruling the court was right.

The statute requires (sec. 3320, R. S. 1878) that the claim

for lien "shall contain a statement of the contract or demand upon which it is founded, the name of the person against whom the demand is claimed, the name of the claimant or assignee, the last date of the performance of labor or furnishing of materials, a description of the property affected thereby, a statement of the amount claimed and all other material facts in relation thereto." Conceding that the notice to the owner of the subcontractor's claim may, if properly filed, serve the purpose of a claim for a lien, it must, of course, contain all the statements made essential to the claim for lien by the statute above cited. The notice in the present case fails in two important particulars to fulfill this requirement: First. It failed to state with whom the original contract for the construction of the building was made. *Bertheolet v. Parker*, 43 Wis. 551. Second. It fails to allege that the claimants have given notice in writing to the owner of the property affected, as required by sec. 3315, R. S. 1878. Both of these facts are "material facts" in relation to the plaintiffs' claim for a lien, and hence are required to be stated, under sec. 3320, above quoted.

The lien being purely a statutory right, it must be pursued as the statute directs, or it fails.

Irrespective, therefore, of any other questions in the case, the judgment must be affirmed.

By the Court.—Judgment affirmed.

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117 654

JOHNSON, Respondent, vs. PUGH, Appellant.

March 23—April 9, 1901.

Contracts: Ambiguity: Parol evidence: Appeal.

1. Where there is no ambiguity in a contract, either in its literal sense or when applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters.

2. Where ambiguity does exist, evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the contract in the sense the parties intended, if that can be done without violence to the rules of language or of law.
3. In such case, the rule is limited to proof of the situation of the parties and the circumstances characterizing the making of the contract: it does not extend to mere conversations between the parties leading up to the completion of the agreement. *Steele v. Schricker*, 55 Wis. 134, followed.
4. Where there is no serious controversy that the construction of a building was in fact defective, and that the defects were noticeable to some extent at the time of an alleged settlement with the builder, the testimony of the owner that the settlement was conditional on the remedying of the defects by the builder is *held* sufficient to sustain a finding on that question in favor of the former, although he had slept upon his rights until the statute of limitations had nearly run on his claim.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action for damages for breach of contract for the construction of a building. The complaint stated that a contract was made between plaintiff and defendant April 1, 1893, whereby the latter for value agreed to construct for the former a two-story frame building with basement, in a good, workmanlike manner, the superintendency and manner of construction to be left to defendant; that plaintiff performed his part of the contract; that defendant constructed and delivered a building under the contract, but it failed to satisfy the requirements thereof in several particulars, specifically pointed out, to the damage of plaintiff in the sum of $2,000.

Defendant answered admitting the making of a contract for the construction of the building which was delivered to plaintiff, and alleging that such contract called for a building according to certain plans and specifications; that it was constructed in accordance therewith, except changes and

additions made by agreement during the progress of the work; that it was completed about July 15, 1893; that plaintiff thereafter accepted it in full satisfaction of the contract on defendant's part, and that there was a full settlement of all transactions under the contract, at which time plaintiff paid defendant the balance of the contract price.

The evidence showed beyond dispute that the building contract was in writing and had been lost. Defendant offered evidence of the negotiations leading up to the preparation and execution of the contract, and the circumstances thereof, which was rejected, due exception being taken to the ruling of the court in that regard. There was evidence tending to show that when the settlement was made defects in the structure, of the kind of or which developed those complained of, were recognized to exist, and that defendant was paid with the express understanding and agreement that the building should not be accepted as it stood, but that such defects should be made good by defendant. There was also evidence to the effect that, after the settlement, defendant recognized his obligation to remedy such defects. There was evidence on the other hand tending to show that the settlement was full and complete at the time defendant received his pay. Evidence was produced of the existence of defects in the building and the reasonable cost of remedying the same. The controverted questions were submitted to the jury under instructions by the court. They found that the settlement was conditional as claimed by plaintiff, that there was a breach of the contract on defendant's part, and that plaintiff's damages therefrom were $300. Judgment was rendered upon the verdict, the questions discussed in the opinion being properly reserved for review on appeal.

The cause was submitted for the appellant on the brief of *Sanborn, Gleason & Sleight*, and for the respondent on that of *Geo. P. Rossman.*

MARSHALL, J. The principal complaint made by appellant's counsel is that the trial court refused to allow evidence in his behalf of the circumstances leading up to and attending the making of the building contract and what was said between the parties. Counsel seem to have an erroneous idea of the rule they invoke. It is not as broad as they suppose, nor does it apply except where there is room for judicial construction. "We understand," say counsel, "that testimony of the circumstances surrounding and leading up to the making of a written contract is always admissible, not for the purpose of changing or varying the terms of the written contract, but for the purpose of putting the court in the circumstances of the parties at the time of the making of the contract." Not so! Where there is no ambiguity in the contract, either in its literal sense or when it is applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters. Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court in the light thereof to read the instrument in the sense the parties intended, if that can be done without violence to the rules of language or of law. *Sigerson v. Cushing*, 14 Wis. 527; *Nilson v. Morse*, 52 Wis. 240; *Lyman v. Babcock*, 40 Wis. 503; *Nash v. Towne*, 5 Wall. 689; *Merriam v. U. S.* 107 U. S. 437; *Minnesota L. Co. v. Whitebreast C. Co.* 160 Ill. 85. There was no claim in this case that there was need for judicial construction, therefore, obviously, the evidence offered was properly rejected. The meaning of the language used in the contract was free from obscurity, hence the reason why it was framed as it was has no significance whatever.

As before indicated, the rule of construction relied upon is not as broad as claimed. It is limited to proof of the situation of the parties and the circumstances characterizing the making of the contract. It does not extend to mere

conversations between them leading up to the completion of the agreement. That is elementary. In *Steele v. Schricker*, 55 Wis. 134, this court used language that so perfectly answers counsel's contention as to much of the evidence that was rejected, that we cannot do better than to repeat it as part of this opinion:

"Oral conversations had between the parties to a written contract cannot be received as explanatory of the writing. Such conversations do not come within the rule that 'you may show the facts surrounding the parties at the time, and the situation in which they were placed in order to interpret the meaning of what they say in the contract.' Professor Greenleaf says: 'Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it.' Conversations between the parties previous to making the written contract are clearly verbal communications respecting it, and must be excluded as such."

The only other complaint made is that the verdict is contrary to the evidence because such evidence was all one way to the effect that there was no defect in the building when respondent took possession thereof, and that the parties made full settlement of all matters relating to it. We do not so read the evidence. Respondent testified positively that he complained of defects in the building when he settled with appellant, and that it was then agreed between them that appellant would remedy such defects. He said: 'When I settled up with him he and I went into the cellar. He said there was not support enough. I did not say anything. I told him I wanted some more,—wanted him to fix it, which he said he would. Since that I have waited relying on his promise. I have spoken to him every year since about it. When he agreed to fix the building in 1893 he said there was not support enough.' There was more evidence of the same nature. True, it was controverted, and there were circumstances tending to discredit it, but the jury believed it and concluded that the settlement with ap-

pellant was conditional upon his remedying the defects referred to, and we are unable to say that such conclusion is not within reasonable probabilities. True, it is singular that respondent slept upon his rights till they were about to be extinguished by the statute of limitations, if his story is true, but we cannot say that is a conclusive circumstance in determining the credibility of his evidence. There was no serious controversy but that the building was in fact defective, and no reasonable controversy but that the defects were noticeable to some degree at the time of the alleged settlement. Under the circumstances the testimony of respondent, that he required appellant to agree to remedy the defects as a condition of obtaining the balance of the contract price, is at least as reasonable as appellant's story that respondent waived an obvious breach of the contract which rendered his building of much less value than the one the contract called for.

By the Court.— The judgment is affirmed.

FLYNN, Appellant, vs. SHIELDS, imp., Respondent.

March 23 — April 9, 1901.

Judgments: Satisfaction: Promissory notes: Collateral security.

A brewing company gave its note for $5,000, payable to a bank, without any consideration, and for the accommodation of P., who borrowed $5,000 from such bank and delivered the brewery company's note as collateral security therefor. Said bank gave its note for $1,500, guaranteed by P., its president, to the M. N. Bank, transferring the brewery company's note as collateral. *Held*, that the M. N. Bank had the right to bring one action against the maker and guarantor of the note given it and another upon the collateral note, and that judgment in its favor in the latter action was not satisfied by collection of the judgment in the former out of the guarantor's property, so long as his debt to the pledgor bank remained unpaid.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was originally commenced against the Washburn Brewing Company, Shell Lake Savings Bank, and Merchants' National Bank of New York, to clear the title to certain lots, claimed to be owned by plaintiff, from the lien of a judgment held by the last named bank against the brewing company. The defendant *James H. Shields* was afterward made a party upon his own application, and put in answer, the other defendants defaulting. The case was tried upon a stipulation of facts, and findings were made in pursuance therewith. Briefly stated, the facts are as follows: Plaintiff is the owner of the property described in the complaint, deriving his title through an execution sale on a judgment against the Washburn Brewing Company. April 19, 1893, said company executed a promissory note for $5,000, payable to the Shell Lake Savings Bank, without consideration, and for the accommodation of A. C. Probert. The latter took said note to said bank, and borrowed therefrom $5,000 on his own note, and delivered the brewing company's note as collateral security therefor. At that time Probert was president of said bank, but it had no notice that said note was without consideration and for accommodation. No part of the sum borrowed by Probert has been repaid to the bank. Thereafter the bank borrowed $1,500 from the defendant Merchants' National Bank of New York on a note guaranteed by Probert, and deposited the brewing company note as collateral security. The $1,500 note not having been paid, the payee brought suit in Bayfield county and obtained judgment against the maker and guarantor, and collected the same out of property of the guarantor, Probert. At the same time it commenced an action on the brewing company note deposited as collateral, and obtained judgment thereon, which was docketed November 3, 1894, and became a lien upon the property of the

plaintiff, then owned by the brewing company. Plaintiff purchased said property subject to said lien. February 10, 1896, the defendant *Shields* recovered a judgment in Washburn county against the Shell Lake Savings Bank for $2,289.78 damages and costs, which was docketed in Bayfield county March 8, 1898. No part of said judgment has been paid, except the sum of $175 paid April 3, 1896. March 4, 1898, *Shields* commenced an action in Bayfield county, in which the Shell Lake Savings Bank was defendant and the Merchants' National Bank of New York was garnishee. The garnishee appeared and made answer.

The court's conclusions were that the judgment held by the garnishee was a valid and subsisting lien on the real estate mentioned, and that plaintiff had no cause of action. Judgment was directed for costs in favor of *Shields*, from which judgment the plaintiff appeals.

For the appellant there was a brief by *Alvord & Dillon*, and oral argument by *E. C. Alvord.*

For the respondent there was a brief by *Sanborn, Gleason & Sleight*, and oral argument by *A. W. Sanborn.*

BARDEEN, J. The plaintiff claims: first, that the purpose of this action is to secure a satisfaction of the judgment against the Washburn Brewing Company, so far as his property is concerned, on the ground that it has been paid; and, second, that *Shields* has no standing in this action, for the reason that he has acquired no interest in the judgment by virtue of the garnishee proceedings; that the other parties interested therein are in default, and plaintiff is consequently entitled to the relief demanded.

1. Plaintiff's attempt to have his property relieved from the lien of said judgment on the ground that it has been paid must fail for the reason that that fact has not been proven. The Shell Lake Savings Bank took the brewing company's note as collateral to secure a *bona fide* advance of

$5,000 to Probert. Let it be admitted that the bank knew that this was accommodation paper. If in fact it was executed and delivered for the procurement of credit for Probert, that knowledge did not affect the character of the bank as a *bona fide* holder. 1 Randolph, Comm. Paper, § 15. As regards third parties, the rights and liabilities of an accommodation party are, in general, the same as those of a party receiving valuable consideration for his signature. Id. § 473. Suppose, instead of executing an independent note, it had indorsed Probert's paper; would any one claim that, so long as the debt to the bank remained unpaid, it could defend on the ground that its indorsement was merely for accommodation? Probert, of course, would never be permitted to enforce the liability, but, when it came to the possession of one who had made a *bona fide* advance relying upon the collateral, we do not very well see how such a defense is available, so long as the debt is unpaid. That Probert's debt to the bank has not been paid in full admits of no question or doubt. The fact is distinctly stipulated, and so found by the court. What might be the rights of plaintiff to insist that credit should be given on the judgment for the amount collected from Probert's property to pay the Shell Lake Savings Bank's debt to the judgment creditor, we need not inquire. The plaintiff is not here seeking to redeem. He insists that the entire judgment has been paid, when the fact is to the contrary. Plaintiff's argument is that as both judgments of the New York bank were upon the same indebtedness, and that indebtedness having been paid, both judgments must be deemed to be satisfied. In this they lose sight of the fact that one judgment was against the maker and guarantor of the indebtedness, and the other upon collateral deposited as security thereof. The bank had a right to bring both suits, and when its claim had been paid the collaterals it held would revert to the debtor who pledged them. The Shell Lake

Savings Bank was therefore entitled to receive back whatever it had deposited to secure its debt, and the New York bank thereafter held the judgment in question as its trustee, without any beneficial interest therein, more than, perhaps, the right to be reimbursed for its expenses and costs. Counsel further base their argument on the assumed fact that the debt to the New York Bank was for Probert's benefit. No such assumption is justified. The finding is that it was the debt of the Shell Lake Savings Bank, and this is supported by the stipulation of facts. Upon no possible theory of the case can we see how it can be successfully claimed that the judgment has been paid. Unless it has been paid in legal effect, the plaintiff has no standing in court.

2. The conclusion above stated renders it unnecessary to consider what interest, if any, *Shields* may have secured in the judgment by his garnishee proceedings. His rights thereunder are not the subject of this contest. He was made a party defendant, and no question is raised regarding the propriety or legality of that order. He put the plaintiff to proof of his case, and, failing in that regard, judgment of dismissal was proper.

By the Court.— The judgment is affirmed.

MOWATT, Respondent, vs. WILKINSON and another, Appellants.

March 23 — April 9, 1901.

Contracts: Custom: Ambiguity: Logs and timber: Accord and satisfaction: Pleading: Amendments during trial: Reducing verdict: Prejudicial error.

1. Custom cannot be proved to vary the terms of an agreement if they are definite and unambiguous.
2. A provision in a contract requiring plaintiff to saw defendant's logs "as fast as I can," is not ambiguous; and in an action on such

contract it is error to admit evidence of a custom to saw logs in the order in which they came to the mill, where it appears that such custom applied to cases where the contract did not provide for continuous sawing.

3. Where no accord and satisfaction is pleaded, the admission of evidence appropriate to the pleadings, but inconsistent with an accord and satisfaction, under such circumstances as to exclude the idea that it was offered for the purpose of proving new issues, does not justify amendment of pleadings in that respect at the close of the trial.

4. A party not entitled to any deduction from a verdict is not prejudiced by a deduction less in amount than he claimed should have been made.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Plaintiff, a sawmill owner at Ashland, entered into written contract with the defendants as follows:

"Ashland, Dec. 10—94.

"*Messrs. S. Wilkinson & Co.*

"*Gents:* I will manufacture for you eight millions of saw logs into lumber, as you may direct, as fast as I can during the fore part of the season of 1895, sorting and cross-piling in a workmanlike manner. I will furnish boom room to store what surplus logs may accumulate faster than sawed. The lumber may remain sixty days free of cost, and no charge to be made for use of docks, if not wanted for other stock after that time. You to pay for sawing the 5th of each month for the lumber cut the preceding month, based upon an estimate and final settlement after final measurement, at the rate of two dollars and twenty-five cents per M., board measure. The No. two culls I will keep for the saw bill, if you wish. I will keep two hundred feet space clear between mill and lumber, for safety against fire.

"Respectfully yours,

"D. W. MOWATT."

"We agree to deliver about eight millions of logs, accepting your terms as per above letter. Neither party to be held to this agreement in case of fire or accident unavoidable.

"S. WILKINSON & Co.,

"per R. G. Peters, Agt."

Defendants' logs amounted to a little over 7,000,000 feet, of which only a little over 6,000,000 feet were delivered to the plaintiff for sawing; and a quantity not accurately ascertained, but which yielded 1,168,000 feet of lumber, were taken to another mill, because, as defendants claimed, the plaintiff did not saw as rapidly as he had agreed, and did not furnish adequate and safe booming facilities. Plaintiff sued to recover $215.08 and interest for contract price of sawing and certain additional expenses, and for $1,560, damages for failure to deliver to him for sawing all of the logs contracted. The defense to the first cause of action was payment; and to the second, failure of plaintiff in the duties assumed by him, in negligent and unworkmanlike sawing, and failure to furnish boom room for storage. The defendants also counterclaimed for damages from the escape and loss through negligence of the plaintiff of a quantity of logs, and from unskilful and improper sawing of a portion of the same. A general verdict for the plaintiff for $1,000 was had, which on motion for new trial the court permitted to stand upon condition of the plaintiff's remitting therefrom $84.06, which he did, whereupon judgment was rendered for the balance, from which defendants appeal.

For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*.

For the respondent there was a brief by *Sanborn, Gleason & Sleight*, and oral argument by *A. W. Sanborn*.

DODGE, J. 1. The first error assigned is the admission over objection of testimony to the effect that it is the custom at Ashland to saw rafts of logs in the order in which they come into the boom, and that if the sawing of the logs of one proprietor is interrupted, and those of another proprietor are taken up, the latter are completed before returning to the former. This testimony is, by the witness who gives it, confined to cases where the contract does not provide for

continuous sawing. Counsel do not seriously disagree as to the general rules governing the admission of evidence to prove custom where there is an express agreement. Such custom cannot be proved to vary the terms of the agreement if they are definite and unambiguous, but only to explain and make definite that which the contract leaves ambiguous or unexpressed. Under that rule the evidence in question seems to have been clearly improper. The contract was not silent as to the rate of sawing, but provided that the plaintiff should saw defendants' logs "as fast as I can"; "neither party to be held to this agreement in case of fire or accident unavoidable." No ambiguity lurks in the expression "as fast as I can." It was the duty of the plaintiff to put defendants' logs through his sawmill without interruption, except for causes making such progress substantially impossible. The evidence thus complained of was further objectionable for that it applied to contracts silent on the question of expedition. The witness was not asked whether any, and if so what, custom prevailed under a contract like this, that required sawing "as fast as I can," but merely with reference to contracts which did not provide for continuous sawing. The admission of this evidence was error which might well have affected the verdict of the jury upon the question of defendants' liability for damages for the alleged breach of contract on their part in taking certain of their logs to another mill to be sawed.

2. Appellants also assign as error the action of the trial court in substantially taking from the jury consideration whether there had been an accord and satisfaction preceding the commencement of the suit. The court did this on the ground that no accord and satisfaction was pleaded, and that the defendants' attitude in counterclaiming damages for unworkmanlike sawing and for failure to properly store and care for logs in compliance with the contract was inconsistent with the claim of accord and satisfaction. In

this ruling the court was clearly correct. While it is true that pleadings may be amended to meet the case made by evidence admitted without objection, the evidence upon which accord and satisfaction is predicated in this case was of an interview at which a payment of $100 was made, for which the complaint did not give credit, and for which the answer claimed credit as payment. It was admissible upon the issue of payment, and no suggestion was made at the time of its introduction that it served any other purpose. Meanwhile the defendants continued to offer evidence in support of the counterclaims above mentioned, demanded their submission to the jury, upon instructions with reference thereto, and, for all that appears in the record, may have been accorded some allowance upon those counterclaims. Evidence thus admitted under circumstances to exclude the idea that it is offered to support a defense or cause of action not set up in the pleadings, and inconsistent therewith, should not justify amendment of pleadings at the close of the trial to bring in such new issues.

3. A claim is made that the trial court committed error in assuming fifty cents per thousand feet as the profit on sawing logs for which the jury had allowed damages to the plaintiff, and in measuring a deduction from the verdict by that figure, when there was evidence which might have justified the jury in adopting a higher rate. This error, if any, could not have been prejudicial to the defendants, for the allowance made by the court was for an assumed excess of logs over the 8,000,000 feet mentioned in the contract. In this the court made a mistake. There was no excess of logs over 8,000,000 feet. The lumber produced therefrom slightly overran that total, but the logs were considerably less than 8,000,000 feet. There was therefore no reason for any deduction, and defendants could suffer no legal injury because the deduction made by the court was less than it

might have been on their theory, when they were entitled to no deduction at all.

For the first error assigned and discussed, the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for new trial.

PROBERT, Respondent, vs. SONJU, Appellant.

March 23 — April 9, 1901.

Debtor and creditor: Fraudulent conveyances: Gift to wife.

Plaintiff at and before her marriage owned a piano, and on her husband's request and his promise to buy her another gave the old one to her father. Afterwards, and while doing a profitable business, with no judgments or suits pending against him, he bought and gave her the piano in question. More than a year thereafter he made a voluntary assignment for the benefit of creditors, up to which time a creditor who recovered judgment subsequent to the assignment, with his wife and daughter, were depositors in the husband's bank. At the time the piano was given, plaintiff's husband owed five dollars as deposits to such creditor's wife and daughter, but none to him. It did not appear that the piano was purchased with intent to defraud existing or subsequent creditors, or that the plaintiff knew or participated in any such intent. *Held* that, even though the husband was insolvent at the time of the purchase in the sense that his resources were insufficient to pay all his liabilities, the transfer was not fraudulent as against such creditor.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Tomkins & Tomkins*, and oral argument by *W. M. Tomkins.*

For the respondent there was a brief by *H. H. Hayden*, and oral argument by *H. B. Walmsley.*

CASSODAY, C. J. This action of replevin was commenced June 28, 1897, to recover the possession of a piano of the alleged value of $300. The answer consists of admissions and denials, and justified the taking of the piano from the possession of the plaintiff June 24, 1897, as sheriff, under an execution issued June 18, 1897, on a judgment previously rendered in favor of one William Flynn, as plaintiff, and against the plaintiff's husband, A. C. Probert, as defendant. The cause was referred to R. Sleight, to hear, try, and determine. Such trial was commenced and concluded before the referee June 24, 1899. After such trial the referee reported his findings of fact and conclusions of law to the court, to the effect that such allegations of the answer were true; that May 28, 1892, the time at which the plaintiff claims that her husband, A. C. Probert, gave her the piano, he was hopelessly insolvent, and had been so for several years prior to that date, and still was; that the piano originally owned by the plaintiff was of the value of $25; that the piano which this action was brought to recover was, May 28, 1892, of the value of $800, and largely in excess of the value of the old piano and any indebtedness from A. C. Probert to the plaintiff; that at the time the piano was levied upon under the execution it was the property of A. C. Probert, and subject to such levy. And, as conclusions of law, he found that the defendant was entitled to judgment of no cause of action against the defendant, together with costs. Upon a motion to set aside such report, the court ordered that the report of the referee be, and the same was thereby, set aside and vacated, and upon the pleadings and the evidence taken before the referee the court found that at the time alleged in the complaint the plaintiff was the owner of, and entitled to the possession of, the piano therein described; that its value was $800; that the plaintiff's damages for the detention thereof were six cents; that the allegations of the complaint were true; that the property de-

scribed having been delivered to the defendant, and he having given the undertaking required by statute therefor, and the plaintiff's attorney having elected to take judgment for the recovery of the possession of the property described, or the value thereof in case a delivery could not be had, it was thereupon ordered and adjudged that the plaintiff do have and recover of the defendant and his sureties on the undertaking the possession of the property described, together with six cents, her damages for such detention, and, in case a delivery could not be had of the property, then that the plaintiff do have and recover of the defendant and his sureties the sum of $800, the value of the piano, in addition to such damages, together with the further sum of $68.95, the costs and disbursements in this action. From that judgment the defendant brings this appeal.

The following facts appear from the record and are undisputed: The plaintiff was married to A. C. Probert April 21, 1886, at her home, in Paterson, New Jersey. Before and at the time of her marriage she had and owned a piano, in good condition, which she knew to be of the value of $275. Her husband did not like that piano, and told her, if she would leave it with and give it to her father, he would get her a new one after they came West. In pursuance of such request, and on the faith of such promise, she gave that piano to her father, and came West with her husband in the spring of 1887. In pursuance of such promise the plaintiff and her husband went to St. Paul, where there was an agent for the Steinway piano, and examined his stock. Her husband then said to her: "Now, *Jane*, as I promised you a piano as soon as I could get you a good one, you can have any make or style you like, for I wish you to feel satisfied, as it is for you and for your use; and as you prefer this style [Steinway], you shall have it." Her husband gave the order for the piano so selected by her on that day. When it was received at their home her husband said

to her: "Now, *Jahe*, this is yours, and how do you like it?" She told him it pleased her in every way; that it was a very beautiful piano, and just the one she wished for. The piano had been in her possession ever since. Her husband was a banker, and the owner of nine tenths of the stock in the Washburn Brewing Company, and was vice-president of the Bay Land & Improvement Company, and its local agent, and transacted a general insurance business. His three banks at that time were doing a solvent, going business. The brewing-company business was in a prosperous condition, paying from five to ten thousand dollars net profit per year, and his real estate and insurance business were both paying good incomes. On June 24, 1893, her husband, A. C. Probert, made an assignment for the benefit of his creditors. Since July, 1896, circumstances have made it impossible for her to live with her husband.

The plaintiff testified that she got the piano in question in November, 1890. There is some evidence tending to prove that she did not get it until May 28, 1892. It does not appear that there was any judgment against her husband, or any suits pending against him, until 1893. It appears that the judgment upon which the execution was issued was not rendered until June 19, 1897; that such judgment was for $230.30 damages and costs; that William Flynn was plaintiff in that judgment; that the amount of damages therein were made up of three accounts at A. C. Probert's bank,— one in favor of his wife for $2.50, deposited in February, 1892, and one in favor of his daughter for $2.50, deposited in February, 1892,— and the balance of the judgment was for moneys deposited in 1893 and 1894, mostly on a long running account of William Flynn with the bank, from which it appears that the balance in his favor June 7, 1893, was only $121.94.

Thus it appears that if the piano was not purchased until May 28, 1892, then only $5 of the indebtedness upon which

the judgment was recovered existed at the time, and none of that in favor of the judgment creditor, whereas, if the piano was purchased in November, 1890, as testified to by the plaintiff, then none of the indebtedness upon which the judgment is based existed at the time. It may be that A. C. Probert was insolvent May 28, 1892, in the sense that his resources were insufficient to pay all his liabilities; but, as indicated, he was for more than a year afterwards doing a large and paying business in the different lines mentioned, with no judgment or suit pending against him. During that time the judgment creditor, William Flynn, and his wife and daughter were depositing moneys in his bank, showing that they did not regard him insolvent. It does not appear from the evidence that A. C. Probert made the purchase of the piano with intent to defraud his existing creditors,— much less, his subsequent creditors. Certainly there is nothing to indicate that the plaintiff knew of or participated in any such intent. On the contrary, it is manifest from the evidence that the plaintiff's husband purchased the piano in pursuance of his agreement with her to purchase it in consideration of the plaintiff giving to and leaving her old piano with her father when she came West with her husband in 1887.

By the Court.— The judgment of the circuit court is affirmed.

HEINEMANN, Respondent, vs. PIER, Appellant.

March 23 — April 9, 1901.

Statutes: Commencement of action: Summons: Substituted service: "Member of family": Laches: Default: Judgment: Appealable order.

1. Statutes dispensing with actual personal service of process must be strictly construed. Thus, under subd. 4, sec. 2636, Stats. 1898, authorizing service of the summons on the defendant, if not found,

by leaving a copy thereof at his usual place of abode in the presence of some one of his family of suitable age and discretion, who shall be informed of the contents thereof, it is imperative that the summons be delivered to a member of the family to which the defendant belongs.

2. A defendant's married daughter, who resided with her husband in the same house or building with defendant but in separate apartments, the two households being managed separately, each paying its own expenses and employing separate servants, is not a "member" of defendant's family within the meaning of the statute. In order to constitute a *family*, the persons composing it must be under one management or head.

3. An order denying a motion to set aside an attempted service of a summons is not appealable.

4. A defendant who has not been personally served with the summons, before the expiration of twenty days after an attempted service, made at the apartment house in which she resided, upon a person not a member of her family, appeared specially in the action and moved to set aside such attempted service. After the entry of judgment by default, she made a second motion to obtain the desired relief, which was denied, and she appealed. *Held*, that she was not guilty of laches.

5. The defect in the service of the summons in such case being jurisdictional, on a motion to set aside the judgment, the defendant is not required to show merits.

APPEAL from a judgment and an order of the circuit court for Iron county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action of ejectment. The summons and complaint were attempted to be served by a private person upon the 7th of September, 1898, by delivering the same to the defendant's daughter, Mrs. John H. Roemer. The following affidavit of service was made, and constitutes the only proof of such service:

"Charles Friend, being first duly sworn, on oath deposes and says: That he is an attorney at law, duly admitted to practice in the state of Wisconsin, residing in the city of Milwaukee, in said state; that on the 7th day of September, 1898, at about 9:30 o'clock in the forenoon, he served the annexed and foregoing summons and complaint upon the defendant, *Kate Pier*, to him well known to be the

identical person named as defendant in the said action, at her home, No. 577 Van Buren street, in the city of Milwaukee, which is her usual place of abode, by delivering to and leaving with her daughter, Mrs. John H. Roemer, a member of the family of said defendant, who resides with her, being a person of suitable age and discretion, a true and correct copy thereof, and of the whole thereof, and at the same time and place the affiant informed said Mrs. John H. Roemer of the contents thereof; that the reason said affiant did not serve said defendant, *Kate Pier*, personally is that she could not be found. CHARLES FRIEND."

On the 20th of September, 1898, the defendant appeared specially for the purpose of moving to dismiss only, and made a motion to dismiss the action for want of service of the summons on the defendant, which motion was based upon affidavits of the defendant and of Caroline H. Roemer, showing that no personal service was ever made upon the defendant, and that Caroline H. Roemer, who is a daughter of the defendant, with whom the summons and complaint were left, was a married woman at the time, and the wife of John H. Roemer, and was a member of the family of John H. Roemer, and not a member of the defendant's family. The motion was denied, and exception taken. The defendant made no further appearance in the action, and judgment by default was entered for the plaintiff June 22, 1899. June 13, 1900, the defendant again appeared specially and moved to set aside the judgment and dismiss the complaint, because no service of the summons had ever been made; said motion being based upon additional affidavits showing more fully that Caroline H. Roemer was not a member of the family of the defendant at the time of the alleged service. This motion was denied, and the defendant appeals from the judgment and from the order denying the last-named motion.

The cause was submitted for the appellant on the briefs of *Timlin, Glicksman & Conway*, and for the respondent

on that of *K. K. Kennan*, attorney, and *Gus. E. Heinemann*, of counsel.

WINSLOW, J. It seems very plain that there was no legal service of the summons in this case, and that the pretended service should have been set aside. The statute prescribes that the summons shall be served upon the defendant personally, or, if not found, "by leaving a copy thereof at his usual place of abode in the presence of some one of the family of suitable age and discretion, who shall be informed of the contents thereof." Stats. 1898, sec. 2636, subd. 4. Statutes dispensing with actual personal service of process must be strictly pursued. *Pollard v. Wegener*, 13 Wis. 569.

It is imperative that the summons be delivered to a member of the family to which defendant belongs. In this case it was delivered to defendant's married daughter, who resided, with her husband, in the same house or building with defendant, but in separate apartments; the two households being managed separately, each paying their own expenses and employing their own separate servants. Families may be separate, though living under the same roof. If it were not so, then service could be made upon any one living in an apartment house by leaving the summons with some other person living in different apartments in the same building, but who, perhaps, is not even acquainted with the defendant. Such an interpretation of the statute would open a wide door to fraud, especially in this day, when apartment buildings housing many different families are so extensively used. In order to constitute a family, the persons composing it must be under one management or head. *Poor v. Hudson Ins. Co.* 2 Fed. Rep. 432.

It cannot be said that the defendant was guilty of any laches in seeking relief. She moved promptly to set aside the service of the summons, but her motion was denied. No appeal could be taken from the order denying her motion.

Latimer v. Central E. Co. 101 Wis. 310. It can be reviewed only on appeal from the judgment. *Drake v. Scheunemann*, 103 Wis. 458. She therefore waited until judgment was entered, and thereafter made a second motion in the trial court to obtain the desired relief, and upon denial of the motion appealed. It is difficult to see how she could have done more. The defect being jurisdictional, she was not required to show merits.

By the Court.—Judgment and orders reversed, and action remanded with directions to set aside the service of the summons and dismiss the complaint.

THE STATE EX REL. DURNER, Sheriff, Plaintiff in error, vs. HUEGIN, Defendant in error.

SAME, Plaintiff in error, vs. AIKENS, Defendant in error.

SAME, Plaintiff in error, vs. HOYT, Defendant in error.

November 21, 1900 — April 30, 1901.

110	189
f110	15 628
110	189
111	26 550
110	18
p113	41
p113	420
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170 NY	348
110	189
115	17 63
58 LRA	148
110	189
117	15 672
117	6 673

Appeal and error: Habeas corpus: *Parties: Right to be heard by counsel: Nature of action: Criminal law and practice: Sufficiency of complaint and commitment: Pleading: Statutory form: Preliminary examination: Review on* habeas corpus: *Jurisdiction: Conspiracy: Combination to control prices: Malice: Construction of statutes.*

1. Upon the review in this court of a case upon appeal or writ of error, a proper party to such appeal or writ is entitled to be heard by counsel regardless of whether that will, for the time being, recognize him as having a status which is one of the very matters to be decided on such review.
2. If, in a *habeas corpus* suit against a sheriff, he is required to restore his prisoner to liberty, he is a party aggrieved within the rule that only such a party is entitled to be heard on appeal or review on writ of error.
3. The statutory and judicial policy which precludes a private attorney from appearing for the state in a criminal case in a trial or appel-

late court except by a special appointment for that purpose, does not apply to *habeas corpus* proceedings.

4. While an attorney cannot appear on the side of the state in a *habeas corpus* suit at public expense, he may appear by request of the proper officer at private expense, to represent the interests of the state, and he may appear regardless of such consent to represent the person charged with the wrong.

5. Regardless of what a *habeas corpus* proceeding should be called under the Code, which divides all judicial proceedings into actions and special proceedings, it is to all intents and purposes a civil suit—a proceeding in the nature of a civil action—in which the party seeking to establish his right to personal liberty is plaintiff within the meaning of sec. 2601, Stats. 1898, regardless of the name by which such a party is commonly known, and the person charged with the wrong is an adverse party, to all intents and purposes a defendant, regardless of the name by which such a person is commonly known in such a proceeding.

6. An order or judgment in a *habeas corpus* suit is *res adjudicata* as to the person charged with unlawfully restraining another of his liberty, till reversed in some proper proceeding.

7. A necessary party to a judicial proceeding as a representative of public authority, having no interest in the litigation except to vindicate such authority, is a party in interest and may be a party aggrieved within the meaning of the appeal statute and the practice on review on writs of error.

8. A warrant of commitment for trial which states the offense charged with convenient certainty is sufficient if good in all other respects.

9. The formal language, "against the peace and dignity of the state of Wisconsin and the statutes in such case made and provided," or equivalent formal words, is unnecessary to either a criminal complaint or warrant of commitment for trial.

10. The rule of convenient certainty as to describing the offense in a warrant of commitment does not require the facts to be stated in detail. A statement thereof according to their legal effect is sufficient.

11. The description of an offense in a warrant of commitment by its generic name, if it has one, whether the offense be statutory or one known to the common law, states by reasonable inference all the facts requisite to such offense.

12. The statutory form for a commitment found in sec. 4774, Stats. 1898, is satisfied by the use of language including all material elements, though such language departs from the particular wording of the form.

13. The rule that a form prescribed by statute must be strictly followed, does not mean literally followed unless the statute clearly so indicates. That is not the case with sec. 4774, Stats. 1898.

14. Upon proceedings before a committing magistrate being properly brought to the attention of the court for review in *habeas corpus* proceedings, the court has jurisdiction to examine into the sufficiency of the complaint to charge a criminal offense, and of the evidence as regards whether it will admit of a reasonable inference of the existence of the ultimate facts necessary to hold the person charged for trial, i. e., that the offense was committed and that there is probable cause for believing the accused to be guilty thereof.

15. A *habeas corpus* suit reaches only jurisdictional error. It does not reach beyond the commitment to the proceedings leading up thereto where the person in custody is detained by virtue of the final judgment or order of a court having jurisdiction of the subject matter and the person. But such is not the case where the person in custody is being held on a commitment for trial.

16. A preliminary examination is not an action. The determination thereof is not a final judgment. The proceeding is not according to the course of the common law; it is purely statutory, and compliance with the statute is requisite to jurisdiction at every step.

17. An examination to determine whether a criminal prosecution shall be commenced is a judicial proceeding in that, so far as the magistrate acts within his jurisdiction, his decision is as binding for the purposes of such proceeding when it is right as when it is wrong. But, like the situation where a board is authorized by statute to act in a *quasi*-judicial capacity upon evidence, if there is no evidence reasonably permitting of action, a decision upon a contrary theory is in excess of jurisdiction.

18. Where an examining magistrate acts upon evidence, and such evidence, looking at it from the most favorable standpoint, will not reasonably permit of such action. the error is jurisdictional, strictly so called, remediable by writ of *habeas corpus*, within the rule that such errors only can be reached by such writ.

19. The doctrine that, where concert of action is necessary to an offense, a charge of criminal conspiracy does not lie, does not apply where the unlawful agreement is of itself an offense, but applies only where the agreement and the consummation thereof are so closely connected that the two constitute really but one offense, as in the case of the offense of adultery or that of bigamy.

20. Where concert is not a mere part of a criminal act, but is in aid of it and is itself criminal, the charge of conspiracy will lie against

those concerting together to perpetrate such act, though only one of the parties, or neither one alone, could effect such purpose.

21. When a complaint charges the offense of conspiracy in the language of the statute, and a conspiracy to carry out the particular purpose of such conspiracy in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage in construing the complaint, but the two charges of conspiracy may be read together as charging a conspiracy of the nature indicated by the particular allegations as regards the method adopted for effecting the criminal purpose.

22. A complaint stating that three persons, naming them, concerted together, using substantially the language of the statute, for the purpose of maliciously injuring another in his business, describes the conspiracy made criminal by sec. 4466*a*, Stats. 1898.

23. An agreement between several independent concerns, each publishing a newspaper and furnishing thereby means for advertising, to compel a fourth person engaged in like business to reduce his rates for advertising or lose customers, indicates a malicious purpose to injure the business of the latter within the meaning of sec. 4466*a*, Stats. 1898.

24. If sec. 4466*a* be regarded as describing a conspiracy between owners of independent enterprises to control the rates charged in their line of work in any locality, great or small, it is not constitutional. However, it cannot be so regarded, for it makes the malicious purpose to injure an essential.

25. Several persons, conducting independent business enterprises, may, in the absence of a statute, combine to control prices for the purpose of promoting their individual interests, and in their operations to that end impoverish a rival and drive him out of business, there being no malicious intent in their conduct, using the term in the sense of malice in law. Sec. 4466*a* does not go that far.

26. All agreements to maliciously injure another in any way are contrary to the policy of the law. Legislative authority is ample to outlaw such agreements to the extent of making the participants therein liable civilly and criminally.

27. A conspiracy to wrongfully injure another is actionable at the common law if executed to the damage of another, whether that other would have a remedy if the act were committed by a single person or not, or whether one person could commit such injury alone.

28. The doctrine that an act which is not actionable if done by one is not when done by many, is not the law of this state. Neither is the doctrine, as applied to a combination of persons to wrongfully

injure another, that an act, lawful without malice, does not become unlawful by adding such element.

29. A combination of persons to injure another without any just cause, such as an injury that is not an incidental effect of the promotion of the legitimate interests of the members of the combine, is a conspiracy to inflict a a malicious injury upon another at common law, and is such an injury under the statute (sec. 4466*a*, Stats. 1898) if it relates to such other's reputation, business, trade, or profession.

30. A combination of individuals for the purpose of inflicting a malicious injury upon another, is in effect an agreement to injure by violence. It was the policy of the common law, as it is of the statute, to prevent such a wrong by civil and criminal liabilities.

31. The term "malicious injury," as used in the statute, is synonymous with that term in the law of conspiracy independent of the statute.

32. Sec. 4466*a*, Stats. 1898, is a mere declaration of the common law. Its only effect is, as to the particular matters stated therein, to remove the necessity for an overt act, which is required by the change in the common law by sec. 4568.

[Syllabus by MARSHALL, J.]

WRITS OF ERROR to review orders of the circuit court for Milwaukee county: R. G. SIEBECKER, Judge. *Reversed.*

Writs of error to the circuit court for Milwaukee county to review orders thereof, in *habeas corpus* proceedings, discharging certain persons from custody who were under restraint, according to forms of law, to await trial for the offense of conspiracy to injure. The complaint charging the offense was under oath and as follows:

"Lucius W. Nieman and Lloyd T. Boyd, of the city of Milwaukee, in said county of Milwaukee, being severally first duly sworn, complain to the police court for the city of Milwaukee, Milwaukee county, Wisconsin, that on or about the 5th day of April, A. D. 1900, at the city of Milwaukee, and within said county of Milwaukee, *Andrew J. Aikens*, *Albert Huegin*, and *Melvin A. Hoyt* did then and there unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of wilfully and maliciously injuring The Journal Company, a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, in its trade and business, and for the

purpose and with the intent then and there of wilfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum, and each of them, in their trade, business, and occupation; that the said The Journal Company at all of said times was, ever since has been, and now is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as The Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee, and throughout the state of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers, and to solicit, receive, print, and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and conspiracy, and subsequently thereto, the said The Journal Company had a large number of advertisers or patrons who advertised in said newspaper, The Milwaukee Journal, and that a large portion of the revenue of said The Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum were at all of said times, and now are, stockholders in said The Journal Company, and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company and of the said The Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

"That the prices of advertisements and the advertising rates which newspapers such as said The Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in

the year A. D. 1900, said The Journal Company in good faith established a new rate for advertising in said The Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about twenty-five per cent. above that which was charged by said The Journal Company for like advertising in the year 1899.

"That at all of said times the said *Andrew J. Aikens* was, and now is, the business manager of The Evening Wisconsin, a daily newspaper published in the city of Milwaukee, and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto said The Milwaukee Journal; that at all of said times said *Albert Huegin* was, and now is, the business manager of The Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the newspapers aforementioned; that at all of said times said *Melvin A. Hoyt* was, and now is, the editor of The Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

"That on or about said 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said *Andrew J. Aikens*, *Albert Huegin*, and *Melvin A. Hoyt*, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement, and mutual understanding, for the purpose and with the intent then and there of wilfully, maliciously, and unlawfully injuring said The Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum, and each of them, in their trade and business, and to that end and with the purpose and intent aforesaid, did confederate, agree, and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal, should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such per-

son or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said The Milwaukee Sentinel, The Evening Wisconsin, and The Milwaukee Daily News, unless such merchant, other person, or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about twenty-five per cent. in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person, or corporation should refuse to pay to said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: The Milwaukee Journal, The Evening Wisconsin, The Milwaukee Sentinel, and The Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said *Aikens*, *Huegin*, and *Hoyt*, and in furtherance thereof, notified by them of the said agreement, conspiracy, and combination between said *Andrew J Aikens*, *Albert Huegin*, and *Melvin A. Hoyt;* that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum; that pursuant to said combination, agreement, confederation, and conspiracy, and in furtherance thereof, said *Andrew J. Aikens*, *Albert Huegin*, and *Melvin A. Hoyt*, did refuse to allow the advertisements of divers

merchants and other persons to be inserted in either The Milwaukee Sentinel, The Evening Wisconsin, or The Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said three last-mentioned newspapers because such merchants or other persons so prevented had paid or had agreed to pay to said The Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy, and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said The Milwaukee Journal, greatly to the injury of the business and trade of said The Journal Company, and of said Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum, and of each of them, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin.

"Wherefore, affiants pray that the said *Andrew J. Aikens*, *Albert Huegin*, and *Melvin A. Hoyt* be arrested and dealt with according to law."

The complaint was filed with the police court in the city of Milwaukee and such proceedings were thereupon had, based thereon, that the defendants therein named were arrested and produced before such court for a preliminary examination, whereupon a motion was made for their discharge upon the ground that the allegations of the complaint were not sufficient to show that a criminal offense had been committed. The motion was overruled. Thereupon evidence was taken before the court, tending to establish the allegations of the complaint. At the close of the evidence a motion was made to discharge each of the defendants, which was denied. The court then decided upon the evidence that the offense charged in the complaint had been committed, and that there was probable cause for believing the defendants guilty of such offense. Each defendant refused to give bail for his appearance before the municipal court of Milwaukee county for trial, whereupon he was duly committed to the custody of the sheriff of such county to

await such trial. A commitment was delivered to the sheriff, as to each defendant, all being in the same form. The following is one of such commitments:

"IN THE POLICE COURT OF THE CITY OF MILWAUKEE.

"State of Wisconsin, }
"Milwaukee County. } ss.

"*The State of Wisconsin to the Sheriff, or his Deputy, or to any Constable or Policeman, and to the Keeper of the Common Jail of said County:*

Whereas, *Albert Huegin* has this day been brought before the police court of said city, charged on the oath of Lucius W. Nieman and Lloyd T. Boyd with having on or about the fifth day of April, A. D. 1900, at the city and county of Milwaukee, committed the offense of conspiracy to injure.

"And whereas, an examination of the said *Albert Huegin* has been held before said court, and the said court being satisfied that an offense has been committed as charged in said complaint, and that there is probable cause to believe the prisoner guilty thereof, whereupon the said court did require the said *Albert Huegin* to recognize with sufficient sureties in the sum of five hundred ($500.00) dollars, for his appearance before the municipal court of said county, at the present term thereof, for the year 1900, and not depart said court without leave. And the said *Albert Huegin* having failed to recognize in due form of law.

"Now, therefore, in the name of the state of Wisconsin, you are hereby commanded forthwith to convey and deliver into the custody of the said keeper of the common jail, the body of the said *Albert Huegin*, and you, the said keeper, are commanded to receive the said *Albert Huegin* into your custody, in the said jail, and him there safely keep until he shall recognize as aforesaid or shall otherwise be discharged by due course of law.

"Witness, the Honorable Neele B. Neelen, justice of the police court of said city of Milwaukee, this 30th day of June, in the year of our Lord one thousand nine hundred."

Thereafter each defendant, on a petition stating the proceedings to which reference has been made, sued out of the circuit court for Milwaukee county a writ of *habeas corpus* to test the legality of his detention. The sheriff of the county made due return to each of such writs, justifying

the detention by the commitment placed in his hands as before stated.

Albert Huegin, one of the defendants, traversing the return of the sheriff, alleged that the proceedings upon which his detention was based were illegal and void and beyond the jurisdiction of the committing magistrate for the reasons set forth in his petition for the writ. Such reasons were, in substance, that the complaint failed to state facts sufficient to constitute a criminal offense. *Melvin A. Hoyt*, another of the persons in custody, demurred to the return to his writ, for insufficiency. *Andrew J. Aikens* interposed a traverse similar to that of defendant *Huegin*. On the hearing on behalf of defendants *Huegin* and *Aikens*, and in support of their pleas to the return of the sheriff, the evidence and proceedings had in the police court were offered and received in evidence. The commitments were also offered and received in evidence. The district attorney then moved the court that James G. Flanders and William H. Austin, attorneys of the court, be allowed to appear as counsel for the sheriff. The motion was denied upon the ground that *habeas corpus* proceedings are criminal in character, or involve an inquiry into a criminal proceeding, and that the duty devolves solely upon the district attorney to represent the state, the real party, in such a matter, the sheriff not being a party to the proceeding at all.

The court then decided that the proceedings which resulted in the several commitments were illegal, because the facts alleged in the complaint did not constitute a criminal offense; that the statute under which the prosecution was commenced covers only cases where the purpose of the combination is to do such an injury that an action at law can be maintained for damages, against the members of the combination, in case its purpose is carried out. An order was accordingly entered to discharge each of the defendants from custody. Such orders are presented here for review by writs of error, as before stated.

After returns were filed to the writs of error issued out of this court, a motion was made on behalf of the sheriff of Milwaukee county for leave to be heard by private counsel, which motion was opposed by the defendants in error.

For the plaintiff in error there were separate briefs signed by the *Attorney General*, and by *Howard Van Wyck*, district attorney, and *A. C. Umbreit*, assistant district attorney, of counsel, and a brief in reply, signed by *Mr. Umbreit*, assistant district attorney, of counsel, and oral argument by the *Attorney General* and *Mr. Umbreit.*

They contended, *inter alia*, that *habeas corpus* being a civil proceeding to enforce the civil right of personal liberty, and the sheriff having been made a party by the defendants in error, he had a right to be represented by counsel of his own selection. *Ex parte Tom Tong*, 108 U. S. 556; *Ex parte Collier*, 6 Ohio St. 60; *In re Sciever*, 42 Neb. 772; *State v. Collins*, 54 Iowa, 441; *In re Baker*, 56 Vt. 1; *Yudkin v. Gates*, 60 Conn. 426; *Hunt v. Haven*, 52 N. H. 162. A court of competent jurisdiction having passed upon the sufficiency of the complaint, the circuit court had no power or jurisdiction to pass upon the same question on *habeas corpus:* if error has been committed, it must be corrected on appeal or writ of error. *In re Blair*, 4 Wis. 522; *In re Eldred*, 46 Wis. 530; *In re Milburn*, 59 Wis. 24; *In re Graham*, 74 Wis. 450, 76 Wis. 366; *S. C.* 138 U. S. 461; *In re Rosenberg*, 90 Wis. 581; *In re Pikulik*, 81 Wis. 158; *Petition of Sember*, 41 Wis. 517, 523, 524; *In re French*, 81 Wis. 597; *In re Schuster*, 82 Wis. 610; *In re Eckart*, 85 Wis. 681; *State ex rel. Dunn v. Noyes*, 87 Wis. 340; *In re Roszcynialla*, 99 Wis. 534, 536; *In re Meggett*, 105 Wis. 291; subd. 2, sec. 3427, Stats. 1898; 3 Bl. Comm. 136; Hurd, Habeas Corpus (2d ed.), 332; Cooley, Const. Lim. (6th ed.), 423; 15 Am. & Eng. Ency. of Law (2d ed.), 166; *Ex parte Lees*, El., Bl. & El. 828; *Ex parte Roberson*, 123 Ala. 103; *State ex rel. Rea v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305; *Ex parte Phillips*, 57 Miss. 357; *Stoner v. State*,

4 Mo. 614; *Ex parte Gafford*, 57 Pac. Rep. 484; *Ex parte Smith*, 2 Nev. 338; *Clifford v. Heller*, 63 N. J. Law, 105; *People ex rel. Trainor v. Baker*, 89 N. Y. 460; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; *People ex rel. McLoughlin v. Wilson*, 88 Hun, 258; *People ex rel. Stern v. N. Y. Soc.* 27 Misc. (N. Y.), 457; *Matter of Brittain*, 93 N. C. 587; *In re Schenck*, 74 N. C. 607; *Ex parte Collier*, 6 Ohio St. 55; *Matter of Patswald*, 5 Okl. 789; *Williamson v. Lewis*, 39 Pa. St. 9; *State v. Everett*, Dudley (S. C.), 295; *Ex parte Ezell*, 40 Tex. 451; *Ex parte Hays*, 15 Utah, 77; *Matter of Lybarger*, 2 Wash. 131; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *In re Eaton*, 27 Mich. 1; *Emanuel v. State*, 36 Miss. 627; *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226; *State v. Davie*, 62 Wis. 305; *State ex rel. De Puy v. Evans*, 88 Wis. 255; *Ex parte Coy*, 127 U. S. 756; *Bergemann v. Backer*, 157 U. S. 655; *Turner v. Conkey*, 132 Ind. 248; *U. S. v. Horner*, 143 U. S. 570; *Burton v. Saunders*, 16 Oreg. 51; *Hauser v. State*, 33 Wis. 678; *Petition of Crandall*, 34 Wis. 177; *State ex rel. Welch v. Sloan*, 65 Wis. 647; *Benson v. McMahon*, 127 U. S. 457; *In re Cortes*, 136 U. S. 330. Whether sec. 4466*a*, Stats. 1898, is declaratory of the common law or in amplification thereof, the complaint in question sets out either a common-law or a statutory conspiracy. *U. S. v. Fisher*, 2 Cranch, 386; *Encking v. Simmons*, 28 Wis. 272; *Weill v. Kenfield*, 54 Cal. 111; *People v. Sheldon*, 139 N. Y. 251; *People v. Petheram*, 64 Mich. 252; *Walker v. Cronin*, 107 Mass. 555; *Arthur v. Oakes*, 63 Fed. Rep. 323; *Ertz v. Produce Exchange*, 79 Minn. 140; *State v. Glidden*, 55 Conn. 46; *Delz v. Winfree*, 80 Tex. 400; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *State v. Stewart*, 59 Vt. 273; *Casey v. Cincinnati T. Union*, 45 Fed. Rep. 135; *Milwaukee M. & B. Asso. v. Niezerowski*, 95 Wis. 129; *Gatzow v. Buening*, 106 Wis. 1; *Plant v. Woods*, 176 Mass. 492; *Pacific F. Co. v. Adler*, 90 Cal. 110; *Texas S. O. Co. v. Adoue*, 83 Tex. 650; *Craft v. McConoughy*, 79 Ill. 346; *Judd v. Harrington*, 139 N. Y. 105;

Sutherland, Stat. Const. §§ 229–254; *State v. Crowley*, 41 Wis. 271; 1 Wharton, Crim. Law, § 364; *Van Rueden v. State*, 96 Wis. 671; *Jackson v. State*, 91 Wis. 253; *Ritchie v. People*, 155 Ill. 98; *State v. Loomis*, 115 Mo. 307; *Matter of Jacobs*, 98 N. Y. 98; *Hopkins v. Oxley S. Co.* 83 Fed. Rep. 912; *Temperton v. Russell*, [1893] 1 Q. B. Div. 715; *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598. The combination set out in the complaint, whether its purpose was solely to injure The Journal Company without resulting benefit to those in the combination, or to benefit themselves by driving a competitor out of business and thus establish a monopoly for itself, was unlawful, and the complaint in question stated an offense under the laws of Wisconsin. *Mapstrick v. Ramge*, 9 Neb. 390; *Gregory v. Duke of Brunswick*, 6 M. & G. 205; *Hartnett v. Plumber's S. Asso.* 38 L. R. A. 194; *Richardson v. Buhl*, 77 Mich. 632; *Beck v. Railway T. P. Union*, 118 Mich. 497; *Casey v. Cincinnati T. Union*, 45 Fed. Rep. 135; *Boutwell v. Marr*, 43 L. R. A. 803; *Jackson v. Stanfield*, 137 Ind. 592; *Van Horn v. Van Horn*, 52 N. J. Law, 284; *State v. Donaldson*, 32 N. J. Law, 151; *Carew v. Rutherford*, 106 Mass. 1; *Morris R. C. Co. v. Barclay C. Co.* 68 Pa. St. 173; *Wildee v. McKee*, 111 Pa. St. 335; *State v. Stewart*, 59 Vt. 273; *State v. Glidden*, 55 Conn. 46; *Santa Clara Valley M. & L. Co. v. Hayes*, 76 Cal. 387; *Sherry v. Perkins*, 147 Mass. 212; *People ex rel. Peabody v. Chicago G. T. Co.* 130 Ill. 268; *People v. North River S. R. Co.* 121 N. Y. 582; *Emery v. Ohio C. Co.* 47 Ohio St. 320; *Arnot v. Pittston & E. C. Co.* 68 N. Y. 558; *Pacific F. Co. v. Adler*, 90 Cal. 110; *Delz v. Winfree*, 80 Tex. 400; *Vulcan P. Co. v. Hercules P. Co.* 96 Cal. 510; *Chaplin v. Brown*, 83 Iowa, 156; *More v. Bennett*, 140 Ill. 69; *Crump v. Comm.* 84 Va. 927; *Lucke v. Clothing C. & T. Assembly*, 77 Md. 396; *Nester v. Continental B. Co.* 161 Pa. St. 473; *People v. Milk Exchange*, 145 N. Y. 267; *Longshore P. Co. v. Howell*, 26 Oreg. 527; *Distilling & C. F. Co. v. People ex rel. Att'y Gen.* 156 Ill. 448; *Bishop v.*

Am. P. Co. 157 Ill. 248; *Doremus v. Hennessy*, 176 Ill. 608; *Adams v. Brenan*, 177 Ill. 194; *Harding v. Am. G. Co.* 182 Ill. 551; *State ex rel. Snyder v. Portland N. G. & O. Co.* 153 Ind. 483; *Murray v. McGarigle*, 69 Wis. 483; *Murray v. Buell*, 74 Wis. 14; *Smith v. Nippert*, 76 Wis. 86, 79 Wis. 135; *Bratt v. Swift*, 99 Wis. 579; *Martens v. O'Connor*, 101 Wis. 18. The evidence taken before a committing magistrate cannot be reviewed by the officer issuing the writ of *habeas corpus*. *Schall v. Bly*, 43 Mich. 401; *Carver v. Chapell*, 70 Mich. 51; *Lord v. Wirt*, 96 Mich. 418; *Birdsall v. Phillips*, 17 Wend. 464; *People v. Commr's of East Hampton*, 30 N. Y. 76; *In re Bion*, 59 Conn. 372; *Ex parte Jones*, 96 Fed. Rep. 200; *U. S. v. Horner*, 143 U. S. 570; *Merriman v. Morgan*, 7 Oreg. 68; *People ex rel. Danziger v. House of Mercy*, 128 N. Y. 180; *Roberts v. Warren*, 3 Wis. 740; *Owens v. State*, 27 Wis. 456; *Baizer v. Lasch*, 28 Wis. 268; *State v. Huck*, 29 Wis. 202; *Callon v. Sternberg*, 38 Wis. 539; *Wright v. Wright*, 74 Wis. 439; *Fulton v. State*, 103 Wis. 238. The orders and the commitments issued thereon are sufficient successfully to withstand challenge on this proceeding. *Howard v. U. S.* 75 Fed. Rep. 986; *People ex rel. Trainor v. Baker*, 89 N. Y. 461; *People ex rel. Johnson v. Nevons*, 1 Hill, 154; *Ex parte Wilson*, 114 U. S. 422; *Turner v. People*, 33 Mich. 363; *Cargen v. People*, 39 Mich. 549; *Ex parte Gibson*, 31 Cal. 619; *State v. Bloom*, 17 Wis. 521; *Wilkinson v. State*, 106 Ala. 23; *State v. Cook*, 92 Iowa, 484; *Pointer v. U. S.* 151 U. S. 418; *Rindskopf v. State*, 34 Wis. 217, 224; *State v. Leicham*, 41 Wis. 573; *Hamilton's Case*, 51 Mich. 174; *Sennott's Case*, 146 Mass. 489; secs. 3429, 4774, Stats. 1898; sec. 7, ch. 6, Laws of 1895; 4 Ency. of Pl. & Pr. 576; *People ex rel. Hutchinson v. Murphy*, 58 N. E. Rep. 984; *Ex parte Kellogg*, 6 Vt. 511.

For the relator there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas* and *William H. Austin*, and oral argument by *Mr. J. G. Flanders* and *Mr. Austin*. To the point that the offense of conspiracy was sufficiently charged

in the complaint, in addition to authorities cited by the plaintiff in error, they cited Sutherland, Stat. Const. §§ 225, 229, 235, 254; 1 Kent, Comm. 462; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326; *Rex v. Turvey*, 2 Barn. & Ald. 522; 1 Bishop, Crim. Prac. (2d ed.), §§ 478, 479; *Toledo, A. A. & N. M. R. Co. v. Penn. Co.* 54 Fed. Rep. 730; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. Rep. 310; *Bromage v. Prosser*, 4 B. & C. 255; *Hilton v. Eckersley*, 6 El. & Bl. 47, 74; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Thomas v. C., N. O. & T. R. Co.* 62 Fed. Rep. 803, 818; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Annis v. People*, 13 Mich. 511. Even if the complaint did not charge an offense, it was error to discharge the defendants without an examination of the testimony to ascertain if the offense which the complaint purported to charge had been committed. Sec. 3429, Stats. 1898; *State v. Bloom*, 17 Wis. 521.

For the defendant in error *Huegin* there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *G. D. Van Dyke* and *W. E. Carter*. They contended, *inter alia*, that in *habeas corpus* proceedings to review a commitment by a police justice or other examining magistrate, the question whether there was *any evidence* of an offense, is now open for review, as it was at the date of the adoption of the constitution. Secs. 3425, 4791, 4792, Stats. 1898; *In re Henry*, 13 Misc. (N. Y.), 734; *Ex parte Dimmig*, 74 Cal. 164; *Ex parte Sternes*, 82 Cal. 245; *In re Snell*, 31 Minn. 110; *State v. Hayden*, 35 Minn. 283; *Ex parte Bailey*, 39 Fla. 726; *Ex parte Jones*, 96 Fed. Rep. 200; *Ex parte Parker*, 11 Neb. 309; 9 Ency. of Pl. & Pr. 1020; 16 id. 860, 861; Spelling, Extr. Rel. §§ 1299, 1300; 9 Am. & Eng. Ency. of Law, 193; 15 Am. & Eng. Ency. of Law (2d ed.), 199; Church, Habeas Corpus, §§ 231–236. A complaint or indictment charging a statutory offense in the language of the statute is sufficient except that, if the words of the statute do not of themselves fully, directly, and expressly, without any un-

certainty or ambiguity whatever, set forth all the elements necessary to constitute the offense intended to be punished, or, if they include within their scope acts or conduct which is not criminal or deserving of punishment and which it cannot be supposed the legislature intended to make punishable, it is not sufficient to charge the alleged offense in the language of the statute. *Steuer v. State*, 59 Wis. 472; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; *Peters v. State*, 66 Wis. 341; *Fischer v. State*, 101 Wis. 23; *State v. Crowley*, 41 Wis. 271; *U. S. v. Carll*, 105 U. S. 611; *Pettibone v. U. S.* 148 U. S. 197; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Simmons*, 96 U. S. 360; *Comm. v. Clifford*, 8 Cush. 215; *Comm. v. Bean*, 14 Gray, 52; *Comm. v. Filburn*, 119 Mass. 297; *U. S. v. Britton*, 108 U. S. 199; *U. S. v. Pond*, 2 Curtis, C. C. 265; *U. S. v. Hess*, 124 U. S. 483; *Ledbetter v. U. S.* 170 U. S. 606; *In re Greene*, 52 Fed. Rep. 111; *Queen v. Peck*, 9 Adol. & El. 686; *Miles v. State*, 94 Ala. 106; *State v. Howard*, 66 Minn. 309, 61 Am. St. Rep. 403; *State v. Jackson*, 39 Conn. 229; *State v. Murray*, 41 Iowa, 580; *Quinn v. State*, 35 Ind. 485; *State v. Williams*, 32 S. C. 123; *Luter v. State*, 32 Tex. Cr. 69; *U. S. v. Patterson*, 55 Fed. Rep. 605; *St. Louis & S. F. R. Co. v. State*, 57 S. W. Rep. 796. The complaint as a whole states no offense known to the law. *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598; *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. 35; *Allen v. Flood*, [1898] App. Cas. 1; 21 Reports Am. Bar Asso. (1898), 335; *Nat. P. Asso. v. Cummings*, 62 Alb. L. J. 68; *Delz v. Winfree*, 80 Tex. 400; Cooley, Torts, 125; *Kimball v. Harman*, 34 Md. 407; *Laverty v. Vanarsdale*, 65 Pa. St. 507; *Longshore P. Co. v. Howell*, 26 Oreg. 527; *Payne v. W. & A. R. Co.* 13 Lea, 507; *Heywood v. Tillson*, 75 Me. 225; *Raycroft v. Tayntor*, 68 Vt. 219; *Beck v. Ry. T. P. Asso.* 118 Mich. 497; *Doremus v. Hennessy*, 176 Ill. 608; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *In re Greene*, 52 Fed. Rep. 118; *People v. Powell*, 63 N. Y. 88; *Queen Ins. Co. v. State*, 86

Tex. 250; *Ætna Ins. Co. v. Comm.* 51 S. W. Rep. 624; *Continental Ins. Co. v. Board of F. Underwriters*, 67 Fed. Rep. 310; *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255; *Hunt v. Simonds*, 19 Mo. 583; *Snow v. Wheeler*, 113 Mass. 186; *Carew v. Rutherford*, 106 Mass. 14; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Macauley Bros. v. Tierney*, 19 R. I. 255; *Brewster v. Miller's Sons*, 38 L. R. A. 505; *Chambers v. Baldwin*, 91 Ky. 121; *Bourlier Bros. v. Macauley*, 91 Ky. 135; *Coeur D'Alene C. & M. Co. v. Miners' Union*, 51 Fed. Rep. 260; *Farmers' L. & T. Co. v. N. P. R. Co.* 60 Fed. Rep. 815; *Arthur v. Oakes*, 63 Fed. Rep. 310; *Boyson v. Thorn*, 98 Cal. 578; *Schulten v. Bavarian B. Co.* 96 Ky. 224; *Dueber W. C. Mfg. Co. v. Howard W. & C. Co.* 66 Fed. Rep. 645; *U. S. v. Addyston P. & S. Co.* 85 Fed. Rep. 271; *Casey v. Cincinnati T. Union*, 45 Fed. Rep. 135; *Bowen v. Matheson*, 14 Allen, 499; *Vegelahn v. Guntner*, 167 Mass. 92; *Dueber W. C. Mfg. Co. v. Howard W. & C. Co.* 55 Fed. Rep. 851; see also *Huttley v. Simmons*, [1898] 1 Q. B. Div. 181; *Hulbuck & Sons v. Wilkinson, H. & C.* [1899] 1 Q. B. Div. 86. The words "wilful" and "wilfully," in common parlance, mean intentionally, as distinguished from accidental and involuntarily; in the penal statutes they mean with evil intent, with legal malice, without ground for believing the act to be lawful. *Docter v. Riedel*, 96 Wis. 158; *Metzger v. Hochrein*, 107 Wis. 267; *Macauley Bros. v. Tierney*, 19 R. I. 255; Anderson, Law Dict. "INJURY," "WILFUL," "WILFULLY;" *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 612; *Parker v. Griswold*, 17 Conn. 302; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Mayor of Bradford v. Pickles*, [1895] App. Cas. 587; *State v. Preston*, 34 Wis. 675; *State v. Castle*, 44 Wis. 670; *State v. Smith*, 52 Wis. 136, 137; *Potter v. U. S.* 155 U. S. 446; *Comm. v. Kneeland*, 20 Pick. 220; *Wass v. Stephens*, 128 N. Y. 123. The word "maliciously" means a wicked intention to do an injury. *Tuttle v. Bishop*, 30 Conn. 85; *U. S. v. Ruggles*, 5 Mason, 192; *Dexter v. Spear*, 4 Mason, 118; *Mogul S. S. Co.*

v. McGregor, 23 Q. B. Div. 612; Anderson, Law Dict. "MALICE." When the act done is not unlawful the motive is immaterial. *Docter v. Riedel*, 96 Wis. 158; *Metzger v. Hochrein*, 107 Wis. 267; *Stevenson v. Newnham*, 76 Eng. C. L. 285; *Benjamin v. Wheeler*, 8 Gray, 409; *Randall v. Hazelton*, 12 Allen, 415; *Frazier v. Brown*, 12 Ohio St. 294; *Chatfield v. Wilson*, 28 Vt. 49; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Mayor of Bradford v. Pickles*, [1895] App. Cas. 587; *Mahan v. Brown*, 13 Wend. 261.

W. H. Timlin, for the defendant in error *Aikens*, contended, *inter alia*, that mere joint action for the purpose of trade competition does not come within the purview of sec. 4466*a*, Stats. 1898. *Hunt v. Simonds*, 19 Mo. 583; *Orr v. Home Mut. Ins. Co.* 68 Am. Dec. 770; *Ætna Ins. Co. v. Comm.* 45 L. R. A. 355; *Beechley v. Mulville*, 102 Iowa, 602; *Allgeyer v. Louisiana*, 165 U. S. 578; *Folwell v. State*, 49 N. J. Law, 31; *In re Grice*, 79 Fed. Rep. 641; *Mogul S. S. Co. v. McGregor*, 21 Q. B. Div. 544; *Macauley Bros. v. Tierney*, 19 R. I. 255; *Bohn Mfg. Co. v. Hollis*, 53 Minn. 223, 55 N. W. Rep. 1119; *Lough v. Outerbridge*, 143 N. Y. 271; *Dueber W. C. Mfg. Co. v. Howard W. & C. Co.* 66 Fed. Rep. 644; *Walker v. Cronin*, 107 Mass. 555; *Delz v. Winfree*, 80 Tex. 400; *Boysen v. Thorn*, 21 L. R. A. 233; *Glencoe L. & G. Co. v. Hudson Bros. C. Co.* 138 Mo. 439; *Vegelahn v. Guntner*, 167 Mass. 92; *Frorer v. People*, 16 L. R. A. 492; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226. Assuming that the *mittimus* under which the sheriff attempted to justify his detention of defendant was sufficient on its face, it was avoided by showing that it was issued in a proceeding in which the police justice had no jurisdiction to issue a warrant and cause an arrest because no complaint clearly stating an offense was filed, nor jurisdiction to hold to bail because the evidence showed no offense had been committed. Sec. 4776, Stats. 1898; *Ex parte Kearny*, 55 Cal. 212; *In re Corryell*, 22 Cal. 178; *Ex parte Mirande*, 73 Cal. 365; *Bushel's*

Case, T. Jones, 13; *Housh v. People*, 75 Ill. 487; *In re Eberle*, 44 Kan. 472; Wilmot, Notes & Op. 107; *State ex rel. Milwaukee v. Newman*, 96 Wis. 273; *In re Eldred*, 46 Wis. 530; *Frazier v. Tierner*, 76 Wis. 562; *State ex rel. Larkin v. Ryan*, 70 Wis. 676; *State ex rel. Att'y Gen. v. Eau Claire Circuit Court*, 97 Wis. 1; *Ex parte Siebold*, 100 U. S. 376; *Ex parte Jackson*, 45 Ark. 158; *In re Barber*, 75 Fed. Rep. 980; *Ex parte Bailey*, 23 So. Rep. 552; *In re Hacker*, 73 Fed. Rep. 464; *Ex parte Kenyon*, 5 Dill. 389; *Nelson v. Cutter*, 3 McLean, 326; *Ex parte Hays*, 25 Fla. 282; *Smith v. Clausmeier*, 136 Ind. 105; *Ex parte Parker*, 11 Neb. 309; *Lueck v. Heisler*, 87 Wis. 644; *McGuire v. Bolen*, 94 Wis. 51; *Steen v. Norton*, 45 Wis. 412; *Darling v. Conklin*, 42 Wis. 478; *State ex rel. Kellogg v. Gary*, 33 Wis. 104; *Sitzman v. Pacquette*, 13 Wis. 302; 1 Smith, Lead. Cas. (7th ed.), 1095; *In re Bonner*, 151 U. S. 242; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 567. If the words of sec. 4466*a*, "injuring another," are to be taken in their popular sense, then the statute is an unwarranted interference with the liberty of the citizen, and leaves him subject to prosecution and possible conviction in all cases of professional and business competition, where there is certainly injury in the sense of loss, impairment, or diminution of trade, business, or professional reputation, and where the jury choose to find that the exercise by the accused of his legal right was wilful or malicious, and such statute is also repugnant to the XIVth amendment to the constitution of the United States, and to sec. 1, art. I, Const. Wis. *In re Grice*, 79 Fed. Rep. 627; *Allgeyer v. Louisiana*, 165 U. S. 578; *Lawton v. Steele*, 152 U. S. 133; *People v. Gillson*, 109 N. Y. 399; *State v. Dalton*, 48 L. R. A. 775; *State v. Julow*, 29 L. R. A. 257; *Metzger v. Hochrein*, 107 Wis. 267; *Rideout v. Knox*, 148 Mass. 368.

N. S. Murphey, for the defendant in error *Hoyt*, contended, *inter alia*, that the commitment is barren of the statement that the alleged "conspiracy to injure" was done

"wilfully and maliciously" as required by the provisions of sec. 4466*a*, Stats. 1898. 1 Arch. Crim. Pr. & Pl. (8th ed.), note p. 151. The commitment should also conclude "against the form of the statute in that case made and provided." 1 Arch. Crim. Pr. & Pl. (8th ed.), note p. 151. By demurrer to the return, the whole question of the legality of the commitment, both in respect to its form, substance, and the validity of the law under which complaint is made, is fairly presented. *In re Booth*, 3 Wis. 23; *In re Booth*, 3 Wis. 157; *In re Eldred*, 46 Wis. 530; *In re Milburn*, 59 Wis. 24. If the sheriff had returned the complaint, warrant, or certified copy of minutes of the court, as the basis or authority to detain the prisoner, they might have tended to cure defects in the commitment. *People ex rel. Trainor v. Baker*, 89 N. Y. 465; *Joab v. Sheets*, 99 Ind. 328. A combination to diminish an individual's gains or profits is lawful or unlawful according to the means employed (2 Wharton, Crim. Law [10th ed.], § 1337; *Comm. v. Hunt*, 4 Met. 111–134), and hence the complaint or indictment must show the nature of the unlawful means employed. 2 Wharton, Crim. Law, 2322, 2323. No conspiracy, except to commit felony upon the person of another, or to commit arson or burglary, is deemed a conspiracy, and is to be punished as such, unless some act, besides such agreement, be done to effect the object thereof, by one or more of the parties. Sec. 4568, Stats. 1898. The act to be done in pursuance of the conspiracy must be *quasi-criminal or immoral*. 4 Am. & Eng. Ency. of Law, 598, note 8; Id. 604. The act is not indictable unless the same act done by one would have involved a criminal injury. *Huttley v. Simmons*, [1898] 1 Q. B. Div. 181. Neither of the defendants is charged with an *integral* offense, but an *integral* part of one, and to complete it concert is necessary. *Shannon v. Comm.* 14 Pa. St. 228. When concert of action is necessary to offense, conspiracy does not lie. 2 Wharton, Crim. Law,

(10th ed.), § 1339; *Shannon v. Comm.* 14 Pa. St. 226; *Miles v. State*, 58 Ala. 390.

On December 7, 1900, a reargument was ordered of the following question only: "Does the word 'injuring' in sec. 4466*a*, Stats. 1898, mean anything more than inflicting an injury for which a civil action for damages can be maintained, and if so is the law constitutional."

The cause was reargued January 15, 16, 1901.

For the plaintiff in error there was a brief signed by the *Attorney General*, and by *Winkler, Flanders, Smith, Bottum & Vilas, W. H. Austin*, and *A. C. Umbreit*, attorneys for the relator, and oral argument by *J. G. Flanders*.

The word "injuring" in the connection in which it is used has but one meaning, and that is its popular and ordinary meaning. Consequently there is no room for interpretation. The word is never used in the technical sense sought to be imputed to it, that is, in the limited sense of such acts of hurt or harm as the law would take cognizance of in a civil action for damages, except when the matter of civil damages is the subject in reference to which it is used; in other words, except when it is intended to express specifically the idea of a wrong which may be redressed in a civil action. 1 Kent, Comm. 462; *Waburton v. Loveland*, 1 Hud. & Brooke, 648; *Toldervy v. Colt*, 1 Mees. & W. 264; *Fairlee v. Corinth*, 9 Vt. 269; 23 Am. & Eng. Ency. of Law, 298, notes 1, 2; Sutherland, Stat. Const. §§ 229, 237, 254; *Rawson v. State*, 19 Conn. 299; *U. S. v. Gooding*, 12 Wheat. 460; Rutherford's Inst. B. 2, ch. 7, sec. 3; *Smith v. State*, 66 Md. 215; *Newell v. People*, 7 N. Y. 97; *Woodbury v. Berry*, 18 Ohio St. 462; *People ex rel. Hughes v. May*, 3 Mich. 598; Hawkins, P. C., B. 1, ch. 27, sec. 2; *Rex v. Eccles*, 1 Leach, 274; 3 Chitty, Crim. Law, 1139; 2 Arch. Crim. Pr. & Pl. 1829; *Crump v. Comm.* 84 Va. 927; *State v. Stewart*, 59 Vt. 273; *State v. Donaldson*, 32 N. J. Law, 151, 156; *State v. Glidden*, 55 Conn. 46; *People v. Petheram*, 64 Mich. 252;

State v. Burnham, 15 N. H. 403; *Comm. ex rel. Chew v. Carlisle*, Brightly, 36; *Curran v. Galen*, 152 N. Y. 33; *Thomas v. C., N. O. & T. R. Co.* 62 Fed. Rep. 17; *Lucke v. Clothing Cutters & T. Assembly*, 19 L. R. A. 408; *State v. Buchanan*, 5 H. & J. 317; Eddy, Comb. & Consp. § 340; Greenhood, Pub. Pol. 651; *Doremus v. Hennessy*, 176 Ill. 608; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *Hilton v. Eckersley*, 6 El. & Bl. 47, 74; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Casey v. Cincinnati T. Union*, 45 Fed. Rep. 138; *Callan v. Wilson*, 127 U. S. 547; *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598; *Continental Ins. Co. v. Board of F. Underwriters*, 67 Fed. Rep. 319; *Temperton v. Russell*, [1893] 1 Q. B. Div. 715; *Walker v. Cronin*, 107 Mass. 555; *Graham v. St. Charles St. R. Co.* 27 L. R. A. 416; *Arthur v. Oakes*, 63 Fed. Rep. 310; *Ertz v. Produce Exchange*, 79 Minn. 140; *Hopkins v. Oxley S. Co.* 83 Fed. Rep. 918.

The authorities conclusively establish the following propositions:

1. The civil action of conspiracy at common law was a substantive right of action, and did not necessarily depend upon a right independent of the conspiracy. (a) The fact of the combination and the element of actual malice might give a right of action where, without the conjunction of the combination and the element of malice, no action would lie. (b) In order to give rise to a right of civil action, actual damage, capable of legal measurement, must have resulted. *Beck v. Railway T. P. Union*, 42 L. R. A. 407, 419; *Doremus v. Hennessy*, 43 L. R. A. 797, 802; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438; *Ertz v. Produce Exchange*, 79 Minn. 140; *Walker v. Cronin*, 107 Mass. 562; *Delz v. Winfree*, 80 Tex. 400; *Graham v. St. Charles St. R. Co.* 47 La. Ann. 214; *Hopkins v. Oxley S. Co.* 28 C. C. A. 99.

2. The crime of conspiracy at common law was a substantive offense, not necessarily dependent upon the crimi-

nality or unlawfulness of the thing done, or of the measures by which it was to be accomplished. It has its foundation in public policy and in the peace and good order of society, and has no necessary connection whatever with any question of civil damages or pecuniary loss to particular individuals. *Rex v. Leigh* (*Macklin's Case*), 2 Camp. 372, note; *Clifford v. Brandon*, 2 Camp. 358; *Boutwell v. Marr*, 71 Vt. 6; 1 Kent, Comm. 402; *McGinley v. Laycock*, 94 Wis. 205; *People v. Sheldon*, 139 N. Y. 251. The act giving to the word "injury" its ordinary meaning is not unconstitutional. *Foster v. Essex Bank*, 16 Mass. 270; *Wadsworth v. U. P. R. Co.* 18 Colo. 600; *Probasco v. Raine*, 50 Ohio St. 390; *Beyman v. Black*, 47 Tex. 558; *People v. Rosenberg*, 138 N. Y. 410; *Durkee v. Janesville*, 28 Wis. 464.

It must be a very extreme case which would warrant the court in holding a statute unconstitutional, unless some specific provision of the constitution can be pointed out which was violated. The statute in question does not unduly restrict the freedom of the right of the individual to carry on his own business in his own way. The police power of the state is, and must be from its very nature, incapable of any very exact definition, but all courts agree that it extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society, and therein may be exercised on many subjects and in numerous ways. The statute in question does not conflict with any provision of the state constitution or with the Fourteenth amendment to the United States constitution. *Allgeyer v. Louisiana*, 165 U. S. 589; *Munn v. Illinois*, 94 U. S. 113, 124; *Slaughter House Cases*, 16 Wall. 62; *Barbier v. Connolly*, 113 U. S. 31; *Soon Hing v. Crowley*, 113 U. S. 709; *Thorpe v. R. & B. R. Co.* 27 Vt. 140, 149; *State v. Heinemann*, 80 Wis. 253, 256; *Baker v. State*, 54 Wis. 372; *State ex rel. Larkin v. Ryan*, 70 Wis. 681. As instances: Quarantine regulations. *Watertown v. Mayo*, 109 Mass. 315; *Beer Co. v. Mass.* 97

U. S. 25; *Milwaukee v. Gross*, 21 Wis. 241; *Taylor v. State*, 35 Wis. 298. Regulation of the erection of buildings in certain limits. Cooley, Const. Lim. (6th ed.), 39; *Wadleigh v. Gilman*, 12 Me. 403; *Vanderbilt v. Adams*, 7 Cow. 349; *Baker v. Boston*, 12 Pick. 184. Regulation of the practice of medicine. *Dent v. West Virginia*, 129 U. S. 114; *Hawker v. New York*, 170 U. S. 189; *People v. Phippen*, 70 Mich. 6. Regulating practice of dentistry. *Ferner v. State*, 151 Ind. 247; *Comm. v. Gibson*, 7 Pa. Dist. Rep. 386; *State v. Vandersluis*, 42 Minn. 129; *State v. Creditor*, 44 Kan. 565. Regulating pharmacists. *State v. Heinemann*, 80 Wis. 253. Pure food laws. *People v. West*, 106 N. Y. 293; *People v. Cipperly*, 101 N. Y. 634; *State v. Campbell*, 64 N. H. 402. Oleomargarine laws. *People v. Aerensberg*, 105 N. Y. 123; *Comm. v. Huntley*, 156 Mass. 236; *State v. Marshall*, 64 N. H. 549; *Powell v. Pennsylvania*, 127 U. S. 678; *State v. Addington*, 77 Mo. 110; *State ex rel. Weideman v. Horgan*, 55 Minn. 183; *Palmer v. State*, 39 Ohio St. 236. Regulation of hawkers and peddlers. *Morrill v. State*, 38 Wis. 428.

Even should the word "injuring" be held to mean no more than to inflict an injury for which a civil action would lie, the complaint in this case states an offense within the statute, the combination alleged having all the elements of a boycott. Anderson, Law Dict. "BOYCOTT;" *Moores & Co. v. Bricklayers' Union*, 7 Ry. & Corp. Law J. 108; *Toledo, A. A. & N. M. R. Co. v. Penn. Co.* 54 Fed. Rep. 730, 738; *State v. Donaldson*, 32 N. J. Law, 151; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Lucke v. Cincinnati C. & T. Assembly*, 19 L. R. A. 408; *Thomas v. Cincinnati, N. O. & T. R. Co.* 62 Fed. Rep. 17; *Arthur v. Oakes*, 63 Fed. Rep. 310.

For the defendants in error there was a brief signed by *Van Dyke & Van Dyke & Carter*, attorneys for *Huegin*, *W. H. Timlin*, attorney for *Aikens*, and *N. S. Murphey*, attorney for *Hoyt;* and the cause was argued orally by *G. D.*

Van Dyke. They contended, *inter alia*, that the statute in question should be construed strictly, because (a) it is a penal statute, (b) in derogation of the common law, (c) of common right, and (d) interferes with legitimate business competition. Black, Interp. Stats. 300, 301; Sutherland, Stat. Const. §§ 346, 349, 350, 370; *Stone v. Lannon*, 6 Wis. 497; *Cohn v. Neeves*, 40 Wis. 393; *Cook v. M., St. P. & S. S. M. R. Co.* 90 Wis. 646. Inasmuch as the word "injuring" has two distinct meanings, one the popular and broad meaning and the other a peculiar and appropriate meaning in the law, the latter meaning should be adopted. Subd. 1, sec. 4971, Stats. 1898; Sutherland, Stat. Const. §§ 253, 254; Black, Interp. Stats. 232, 233; *Western Union T. Co. v. Scircle*, 103 Ind. 229; *Buckner v. Real Estate Bank*, 5 Ark. 536; *Hillhouse v. Chester*, 3 Day, 211. Notwithstanding the liberal construction of the bill of rights (sec. 9, art. I, Const.) there are still acts *damnum absque injuria* in this state. *Metzger v. Hochrein*, 107 Wis. 267; *Duffies v. Duffies*, 76 Wis. 374; *Doctor v. Riedel*, 96 Wis. 158; *Heiss v. M. & L. W. R. Co.* 69 Wis. 555. As examples where the word "injury" or "injured" has been held to mean such a legal wrong as would be the subject of an action for damages at common law, see *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541; *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. St. 544; *Janesville v. Carpenter*, 77 Wis. 238; *Brittle Silver Co. v. Rust*, 51 Pac. Rep. 526; *Jordon v. State*, 142 Ind. 427; 11 Am. & Eng. Ency. of Law, 1, note 1; *People v. Howard*, 17 Cal. 63; *North Vernon v. Voelger*, 103 Ind. 314; *Smith v. Wilcox*, 47 Vt. 537; *Woodruff v. North B. G. M. Co.* 18 Fed. Rep. 753, 781; *Talcott v. Buffalo*, 125 N. Y. 280; *Chittenden v. Wurster*, 152 N. Y. 435; *Whitney v. Hirsch*, 39 Hun, 325; *Gibbs v. McNeeley*, 102 Fed. Rep. 594.

In sec. 4466*a*, Stats. 1898, the words "wilfully and maliciously" modify the words "injuring another." If this word "injuring" be given its popular meaning, then we

have the anomaly of an act punishing as criminal a mere agreement to do a lawful act by any lawful means, if done wilfully or maliciously. It makes the motive, the mere mental operation, the *corpus delicti*, irrespective of any overt act. *State v. Clark*, 29 N. J. Law, 96; *Cohn v. Neeves*, 40 Wis. 393; *Folwell v. State*, 49 N. J. Law, 31. Where a court has sustained a civil action for damages or for an injunction, such decision affirms that the acts of which the plaintiff complains were such as constituted an injury within the legal meaning of the word. Strikes and boycotts under many different circumstances, and employing many different means, have been held to constitute such injury, but always excluding combinations for competitive purposes. *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *Ertz v. Produce Exchange*, 79 Minn. 140; *Delz v. Winfree*, 80 Tex. 400; *Walker v. Cronin*, 107 Mass. 562; *Graham v. St. Charles St. R. Co.* 47 La. Ann. 214; *Vegelahn v. Guntner*, 167 Mass. 92; *Beck v. Railway T. P. Union*, 118 Mich. 497; *Casey v. Cincinnati T. Union*, 45 Fed. Rep. 135; *Lucke v. Clothing Cutters & T. Assembly*, 77 Md. 396; 28 Am. L. Rev. 47, 80–84; 21 Am. L. Rev. 509, 764; *Curran v. Galen*, 152 N. Y. 33; *Hollenbeck v. Ristine*, 105 Iowa, 488. If the words "injuring another by any means whatever" be interpreted in their broad popular meaning, and thereby the statute be extended to include all agreements to do lawful acts by lawful means which may prejudice another in his reputation, trade, business, or profession, under the facts in the case at bar, it violates rights guaranteed by the constitution of this state, viz: Secs. 1, 8, and 13, art. I, Const. Wis. It also violates the XIVth amendment of the federal constitution, which declares:

"No state shall enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law," etc.

The liberty of enjoying one's property either singly or conjointly with others in any legal manner; of engaging singly or conjointly with others in any lawful trade or business; and of contracting with others for that purpose, are rights guaranteed to every citizen, although injury in the broad sense may result to some one. To deny citizens such rights, by making it a crime to exercise one's legal rights, takes away all "liberty," deprives him of his property without any compensation, and holds him to answer for a criminal offense without due process of law. *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, and note; *Matter of Jacobs*, 98 N. Y. 98; *People v. Gillson*, 109 N. Y. 389, 405; *Godcharles v. Wigeman*, 113 Pa. St. 431; *Comm. v. Perry*, 155 Mass. 117; *State v. Wyatt*, 48 L. R. A. 265; *State v. Loomis*, 21 L. R. A. 789, and note; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 881, note; *Palmer v. Tingle*, 55 Ohio St. 423; *Shaver v. Penn. Co.* 71 Fed. Rep. 931; *Vilas v. McDonough Mfg. Co.* 91 Wis. 617; *Mallory v. La Crosse A. Co.* 80 Wis. 180; *Jones v. Great Southern F. H. Co.* 79 Fed. Rep. 477, 482; *In re Eight Hour Law*, 21 Colo. 29; *Holden v. Hardy*, 169 U. S. 366; *Low v. Rees P. Co.* 41 Neb. 127; *In re House Bill No. 203*, 21 Colo. 27; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492; *Richie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, and note; *Harding v. People*, 160 Ill. 459; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, and note; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181; *Ex parte Bailey*, 23 So. Rep. 553; *State v. Dalton*, 48 L. R. A. 775; *Valentine v. Berrien Circuit Judge*, 83 N. W. Rep. 594; *Kuhn v. Common Council of Detroit*, 70 Mich. 534; *In re Ah Jow*, 29 Fed. Rep. 181; *Allgeyer v. Louisiana*, 165 U. S. 578; *Frisbie v. U. S.* 157 U. S. 160, 165; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 757; *Lawton v. Steele*, 152 U. S. 133; *In re Grice*, 79 Fed. Rep. 627; *In re Marshall*, 102 Fed. Rep. 323. It is obvious from the cases cited that a statute

such as sec. 4466*a* broadly construed finds no support in the police power, but is clearly an unlawful interference with the exercise of private rights. No question of public health, public safety, or public morals is involved. *Lawton v. Steele*, 152 U. S. 136; *State v. Dalton*, 48 L. R. A. 775; *State v. Loomis*, 21 L. R. A. 789.

MARSHALL, J. Because of the long delay in announcing the decision in this case it is deemed proper to say, as a justification therefor, that the number and importance of the questions involved were such that the case seemed to call for the most careful study by each member of the court which the amplest opportunity therefor would permit, and to require that a decision should be rendered only when it could embody the best judgment of each such member, if that result could be reached within such time as not, by reason of the delay, to materially prejudice the administration of justice. There is room for congratulation that the purpose of the long deliberation upon the case has been accomplished. To circumstances which were unavoidable, preventing that full discharge of official duty, as regards individual study of the case, which was desired prior to settling upon the final conclusions, the delay must be in the main attributed. The questions legitimately discussed by counsel are so numerous that in the preparation of the opinion a choice had to be made between stating mere conclusions with appropriate supporting authorities, and discussing such questions at length. By the former method a brief opinion would have sufficed to cover the case; by the latter a lengthy opinion was unavoidable. The former course would have required but little labor compared with the latter, but it seemed that the careful preparation of the case and presentation of it by numerous and able counsel for the respective parties could not be adequately responded to, so as to fairly indicate the appreciation felt here for the assistance received from such preparation and presentation,

otherwise than by a pretty full discussion of each of the points decided which counsel upon either side deemed of sufficient importance to require them to present for that purpose. Acting upon that conviction we will discuss each of such points with sufficient fullness to satisfy all reasonable expectation and endeavor to make the conclusions reached a definite declaration of the law, so that, in addition to adjudicating the rights of the parties to the suit, the result will be valuable, as regards each point presented, in guiding the courts and the profession in this state in future cases.

Opposition to the motion on behalf of the relator to be heard in this court by private counsel in his behalf, was based on the following grounds: (1) It involves consideration of one of the errors claimed to have been committed by the court below which should only take place upon the consideration of the other errors. (2) The attorney general is required by sec. 163, Stats. 1898, to appear for the state and prosecute or defend all proceedings in the supreme court, in which the state is interested or a party, and that precludes appearance by private counsel in criminal proceedings, the law being the same as to the attorney general in the supreme court as it is as to the district attorney in the circuit court. (3) The sheriff is not a party and has no personal interest in the result of the review of the proceedings called in question by the writs of error. Each of such propositions involves an important question of practice, which is regulated either by statute or by the judicial policy of the state, and has received consideration resulting in the following conclusions:

1. If the sheriff of Milwaukee county by whom the state sued out the writ of error, is a party to the proceedings in this court and in any event is entitled to be heard as such he cannot be denied that right because to allow it would be inconsistent with a ruling of the court below, sought to be

reviewed by the writ of error. If he is properly here as a party, obviously, his rights as such cannot be jeopardized by any decision made by the court below which is a subject for review on the writ of error. That seems too clear for reasonable controversy. If counsel's position be correct, no person denied the right to be heard in a trial court upon the ground that he is not interested in the controversy, can be heard on appeal from the decision except there be a judgment for costs against him, because recognition here to present his case would be a recognition of his claim that he was a party to the proceeding in the trial court. We cannot sanction that doctrine. The sheriff was the actor in suing out the writ of error. He appears at the bar of the court and asks to be heard by counsel. If he is a party to the proceeding he must be heard regardless of any incidental bearing the decision may have upon any question involved in the review of the proceedings upon the writ. Manifestly, if he was a party in interest in the *habeas corpus* proceedings he was a party to the suit commenced in this court by the writ of error to review the result thereof, if he was bound thereby to his injury, to some appreciable degree, either directly and immediately or so that direct injury of some sort may probably come to him therefrom; in short, if he is "a party aggrieved." Our appeal statute on that point (sec. 3048, Stats. 1898) is no broader at most than the common-law rules governing the subject of parties in suits commenced by writs of error, or sec. 3043. A writ of error lies in favor of him "who is a party to the record;" a man who "is aggrieved by an error in the foundation, proceeding, judgment, or execution, in suit," said Justice GRIER in *Bayard v. Lombard*, 9 How. 530, quoting from early common-law writers. See, also, 7 Ency. of Pl. & Pr. 856. That the relator here is a party aggrieved within the rule stated it seems is quite clear, but we will refer to the subject more at length in the discussion of the third proposition.

2. The second proposition assumes that proceedings to test the right of a person to his personal liberty are criminal in character and governed by the rule declared in *Biemel v. State*, 71 Wis. 444; *State v. Duff*, 83 Wis. 291, and other cases. Whether *habeas corpus* proceedings are in their nature civil or criminal we do not deem necessarily material. If the decision were to turn on that question, though, as at present advised, it would result in favor of the proposition that the remedy by *habeas corpus* is a civil remedy, as contended by the relator. The writ *ad faciendum, subjiciendum, et recipiendum* of the common law was the sole legal remedy of a person wrongfully restrained of his liberty. The purpose of a proceeding instituted by it was not to punish for the wrongful act of restraining him of his liberty, nor did it concern, necessarily, the wrongful act causing his detention. It was confined to compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty notwithstanding any charge made against him. The case cited to our attention by relator's counsel (*Ex parte Tom Tong*, 108 U. S. 556, opinion by WAITE, C. J.) states briefly and clearly the true nature of such proceedings, as they are uniformly regarded in the books:

"The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process."

In a later case, *Cross v. Burke*, 146 U. S. 82, the court, speaking by FULLER, C. J., said: "It is well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding." So the authorities in this state, that it is the policy of the written law that no one but the public prosecutor or his assistant duly appointed shall be permitted to represent the commonwealth in criminal cases against the accused, do not extend to a civil action or proceeding in the nature of a civil suit commenced by the issuance of a writ of *habeas corpus*, because, if for no other reason, it is not a criminal suit. The law that makes it the duty of the district attorney of a county to appear and prosecute or defend all actions, applications, or motions, civil or criminal, in the courts of his county wherein the state is interested or a party, except for assault and battery (sec. 752, Stats. 1898), precludes legal services being rendered by way of assisting the district attorney in a civil matter at public expense. That has often been decided. *McDonald v. Milwaukee Co.* 41 Wis. 642; *Manitowoc Co. Sup'rs v. Sullivan*, 51 Wis. 115; *Cutts v. Rock Co.* 58 Wis. 642; *State v. Duff*, 83 Wis. 291; *Frederick v. Douglas Co.* 96 Wis. 411. But it has nowhere been decided that the state's attorney, either of the county or the state at large, cannot obtain or receive assistance at his own expense or the expense of others in a civil proceeding. In *McDonald v. Milwaukee Co.*, *supra*, the sheriff employed counsel to defend against proceedings commenced by writ of *habeas corpus*. He made a claim against the county for his disbursements for such services. The claim was held invalid, because of the duty of the district attorney of the county to attend to such matters as a part of his official duties, made so by sec. 3433, Stats. 1898, which provides that when it appears from the return to a writ of *habeas corpus* that the person seeking to obtain his liberty is detained upon a criminal accusation, no order shall be made for his discharge until opportunity shall be given to the dis-

trict attorney of the county to be heard, if to be found within the county; and because such provision is exclusive of the right of the sheriff to employ counsel at public expense. The case must be read in the light of what was under consideration, that is, the right of the sheriff to employ counsel at public expense. There is nothing in that to militate against a person other than the district attorney standing in court as the representative of the people in a civil action by consent of the public attorney. No judicial policy with which we are familiar is thereby violated, nor any constitutional right. Such a representative cannot claim compensation for his services except as against the individual employing him. That is as far as the decisions of this court go. No reason is perceived why a reputable attorney in a mere civil action cannot be heard in court on behalf of the state by permission of the officer whose duty it is to stand responsible for the due protection of the public interests, without the violation of any right secured by the constitution or any law, to the person standing in the capacity of an adversary to the public in the proceedings. It has been the universal practice in this state to permit private counsel in this particular class of cases, as is abundantly shown by the decisions cited by counsel for the relator. *In re Booth*, 3 Wis. 1; *In re Falvey*, 7 Wis. 630; *In re Pierce*, 44 Wis. 411; *In re Eldred*, 46 Wis. 530; *State ex rel. Dunn v. Noyes*, 87 Wis. 340; *State ex rel. Larkin v. Ryan*, 70 Wis. 676; *In re Rosenberg*, 90 Wis. 581.

3. What has been said goes upon the theory that the state is the only party interested in *habeas corpus* proceedings adversely to the petitioner, when the person alleged to be wrongfully restrained of his liberty is detained upon a criminal charge; but, as indicated in the brief discussion of the first proposition, we cannot agree with the learned counsel for defendants in error that the respondent in such a proceeding is not a party thereto. The issuance of a writ of

habeas corpus is to all intents and purposes the commencement of a civil action, not an action strictly so called, within the meaning of sec. 2629, Stats. 1898, to be commenced by the issue of a formal summons, but in the same sense that proceedings to enforce the remedy by *mandamus* and proceedings by writ of error are civil suits, as has been repeatedly held. The issuance of the writ is the commencement of a proceeding in a court of justice for the enforcement or protection of a right within the meaning of sec. 2595. In *Ex parte Tom Tong*, 108 U. S. 556, the issuance of the writ of *habeas corpus* was denominated the commencement of a suit to enforce a civil right. That was said in the same sense that this court declared, in *Paine v. Chase*, 14 Wis. 653, that the issuance of a writ of error is the commencement of an original suit and regarded as the commencement of an action, and in the same sense that it was said, in *State ex rel. G. B. & M. R. Co. v. Jennings*, 56 Wis. 113, that a proceeding by *mandamus* is essentially a suit. True, the issuance of either of the writs mentioned, as before indicated, is not the commencement of an action strictly so called within the meaning of the Code, because it is there declared that all remedies in courts of justice are divided into actions and special proceedings (sec. 2594, Stats. 1898) and that a civil action shall be commenced by the service of a summons (sec. 2629). But the grant of power to circuit courts to issue writs of *habeas corpus* and *mandamus*, among other common-law writs, contemplated their use for the purposes they were devoted to before the adoption of the Code, i. e., for the commencement of suits within the broad meaning of the term; and their essential character in that regard has not been and cannot be changed by any legislative enactment. Whether the issuance of such a writ be called by the Code the commencement of a civil action or a special proceeding, it is to all intents and purposes the commencement of a suit and the final determination thereof is a final judgment in a suit or

proceeding in the nature of a civil action. In *Holmes v. Jennison*, 14 Pet. 540, 564, Chief Justice TANEY said: "If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." The court further said, in effect, that the term "proceedings in a suit" and the term "proceedings in an action" are synonymous; that when a law confers, in general terms, jurisdiction upon an appellate court to review on writ of error the final judgment in any suit, it includes jurisdiction to review the final determination in *habeas corpus* proceedings.

It follows from what has been said that the *habeas corpus* proceedings in question must be regarded as a civil action—an ordinary proceeding in a court of justice to enforce a personal right,—within the meaning of sec. 2595, Stats. 1898, which says that such a proceeding is an action. That is in harmony with the decisions of this court to the effect that, without any statutory regulations, a writ of error lies to review a final determination on *habeas corpus* (*State ex rel. McCaslin v. Smith*, 65 Wis. 93), and with *State v. Kemp*, 17 Wis. 669, and cases which followed it, denying to the state the use of the writ of error in criminal cases. That rule was one of judicial policy only, in a field where it was supposed the court was free to establish the law for this state, and has been abrogated by statute (sec. 3043, Stats. 1898). This was the suit of the defendants in error and their only adequate remedy to vindicate their right of personal liberty. The immediate instrument of the wrong complained of was the sheriff of Milwaukee county. The petitioners for the writ sought to establish their right to personal freedom notwithstanding the commitment under which the sheriff justified his conduct. They were, to all intents and purposes, plaintiffs, within the meaning of sec. 2601, regardless of the name by which such parties are commonly known. The adverse party on the record was the sheriff. He was

to all intents and purposes the defendant in the proceedings, regardless of the name by which such a party is commonly known. The statute (sec. 2595) says: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right," and unless the state is the plaintiff and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, and every person necessary to a complete determination of the controversy as against the plaintiff is a necessary party and an interested defendant. Sec. 2603. The term "party to a suit [or action]" applies as properly to persons seeking, by writ of *habeas corpus*, to vindicate their right to personal freedom, and to the adverse party who is restraining them of it, as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter, persons on whom it is sought to impose an immediate duty or liability to recognize such rights. 15 Ency. of Pl. & Pr. 463.

Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel. True, as counsel for defendant in error say, sec. 3436, Stats. 1898, protected the sheriff from any liability for obeying the order discharging, or directing a discharge of, the prisoners, but there is no statute protecting him from liability for the wrongful imprisonment.

We are not unmindful that there are decisions to the effect that an adjudication in *habeas corpus* proceedings is not binding in a subsequent suit to vindicate the same right be-

tween the parties, or a suit between such parties where the same question is material. *In re Quinn*, 2 App. Div. 103; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; Hurd, Habeas Corpus, § 386. That doctrine was based on a supposed common-law rule that a decision on *habeas corpus* is not subject to review on appeal or writ of error. Such doctrine has been modified by judicial policy in many jurisdictions and in others displaced by statute, as it has been in this state, so far as it before prevailed here. Church, Habeas Corpus (2d ed.), 577; *Ex parte Cuddy*, 40 Fed. Rep. 62; *Perry v. McLendon*, 62 Ga. 598; *Ex parte Jilz*, 64 Mo. 205. Sec. 3437, Stats. 1898, which is the same as the Missouri statute that governed *Ex parte Jilz*, expressly changed the common-law rule as regards the effect of a final determination of a *habeas corpus* proceeding. It expressly prohibits the commencement of a second *habeas corpus* proceeding for the same cause, while the determination in the first remains unreversed. That, and the remedy for a review of such a final determination by writ of error sued out by either party to the writ, which is given by our statute (sec. 3043), effectually changed the common-law rule, so that the doctrine of *res adjudicata* has now the same applicability to *habeas corpus* proceedings as to other suits.

We have not overlooked the suggestion that the doctrine that ruled *McCarty v. Sup'rs of Ashland Co.* 61 Wis. 1; *People ex rel. Breslin v. Lawrence*, 107 N. Y. 607; and *Bryant v. Thompson*, 128 N. Y. 427, and some other cases, applies to the status of a person defending against the charge in *habeas corpus* proceedings of unlawfully restraining another of his liberty. That doctrine is that a person or tribunal, exercising judicial functions between parties, is not a party to a proceeding to challenge a decision made by him so that he may himself take an appeal or be a party to an appeal involving such decision. In *McCarty v. Sup'rs of Ashland Co.* a decision of the board of supervisors had been reversed on

writ of *certiorari* and the board attempted to appeal. In *People ex rel. Breslin v. Lawrence* a judge whose decision of a matter had been reversed on *certiorari* attempted to appeal. The mere statement of the circumstances under which courts have applied the doctrine referred to is sufficient to show that it has no application here. If the court that heard the *habeas corpus* proceedings or the examining magistrate were here claiming to be a party to the writ of error, and demanding an opportunity to be heard, the cases cited by counsel would be in point. It has been repeatedly held that a person or body not acting in a judicial capacity, but a party to a judicial proceeding as a representative of the public, even though having no pecuniary interest in the litigation, has an appealable interest in a judgment adverse to his or their authority. *State ex rel. School Dist. No. 2 v. Wolfrom*, 25 Wis. 468; *Moede v. Stearns Co.* 43 Minn. 312; *People v. Jones*, 110 N. Y. 509.

What has been said, it seems, covers every suggestion that has been made why the sheriff of Milwaukee county was not entitled to be heard by counsel in the circuit court in the *habeas corpus* proceedings and why he is not entitled to be heard in this court as a party to the writ of error. He was and is a party in every sense of the word, and is, so far as concerns himself, entitled to be heard by counsel of his own choosing.

The first question on the merits is, Does the warrant of commitment state any offense known to the laws of this state? That involves an inquiry into whether a statement of the facts — necessary to the jurisdiction of the offense, if there be one, and in substance that the person named in the commitment on a particular day named, was brought before the court charged on oath with committing the offense of conspiring to injure, and that such court, from the examination had, was satisfied that the offense charged had been committed and that there was reasonable ground to

believe such person guilty thereof — shows an adequate cause for holding such person for trial. Defendants in error claim that it does not, because it fails to show, in detail, the existence of the facts necessary to constitute the offense of conspiring to injure, with some approach at least to the technical accuracy of an indictment at common law, so as to identify the alleged wrongful conduct with either the common-law offense of conspiracy or the offense stated in sec. 4466*a*, Stats. 1898. Counsel do not state the rule of certainty by which they contend the commitment should be tested in the exact language we have used, but it seems from their reasoning that what has been said fairly expresses their contention. They say the warrant was fatally defective because it did not show with whom the person named therein conspired, nor the fact that there was more than one guilty participant so as to make a combination possible; that it failed to state the facts constituting the offense; that it omitted to recite that the alleged combination was entered into for the purpose of wilfully and maliciously injuring another; that it did not literally follow the statute; and that it did not conclude with the words "against the form of the statute in such case made and provided."

We do not understand that any such degree of certainty in a commitment as that contended for is required. Authorities may be found here and there tending to support counsel's contention; for example *Ex parte Branigan*, 19 Cal. 133, cited to our attention, which is contrary to later decisions made by that court and out of harmony with the current of authority, as we shall show. The general rule is that it is sufficient, in a commitment for trial, to state with reasonable clearness the nature of the offense with which the person is charged, and conclusions of fact in general language, justifying his detention on such charge; that a statement of the specific facts in detail, on which the charge is based, is unnecessary. A multitude of authorities to that effect

might be cited, commencing with the older books and coming down to date. In *Collins v. Brackett*, 34 Minn. 339, the offense charged was one created by statute. The particular section was not referred to, nor were the facts essential to the offense stated in detail; but there was sufficient in the commitment to clearly indicate the kind of offense for which the accused was held to answer, and sufficient to indicate by reasonable inference the statute creating the offense. The court said that it satisfied the rule of convenient certainty by which such instruments are to be tested; that it pointed by reasonable inference to the statute creating the offense, and therefore, by reasonable inference, stated everything necessary to the offense which was not specifically set out. 'It was not necessary,' said the court, 'in such an instrument, to set forth the facts constituting the offense particularly. . . . It is impossible to construe the commitment as referring to any other than the statutory offense. While it does not set forth every ingredient in such offense, it contains specifications enough to indicate the general nature of the crime charged, and that is sufficient.' In *State v. Everett*, Dud. (S. C.), 295, a case often referred to by courts and text-writers, the commitment considered merely described the offense as the crime of larceny, no fact being stated essential to that offense; yet it was held, on *habeas corpus*, that the commitment was sufficiently certain to justify the officer in detaining the prisoner; that it is a great mistake to suppose that such a warrant need enumerate any fact or circumstance accompanying the offense, the nature of which is set forth therein; that it is sufficient to merely state the offense with convenient certainty; that it should not be for felony generally, but that the instrument should indicate the special nature of the felony. That decision is in harmony with the authorities generally, though directly contrary to *Ex parte Branigan*, *supra*, which supports counsel's views as we have before indicated. All the cases cited,

it will be found, declare for the rule of convenient certainty merely. But while the California case regards that degree, as it seems, to call for certainty to a certain intent in particular, it is obvious that convenient certainty is satisfied where language is used which, by reasonable inference, points with reasonable clearness to the particular subject intended to be expressed. The doctrine which we say generally prevails was followed in later California cases. *Ex parte Moan*, 65 Cal. 216; *Ex parte Walpole*, 85 Cal. 362. True, reference is there made to a form for commitment prescribed by statute, which is however substantially identical with the one which, it is said in sec. 4774, Stats. 1898, may be used. The California court, in the early case, while reaching a conclusion directly opposite to that declared in *Collins v. Brackett*, *supra*, and the cases to which we will presently refer, referred to the same authorities for support, i. e., 1 Chitty, Crim. Law, 109, and 2 Hale, P. C. 122. A careful reading of those authorities discloses the fact that what is said about the higher degree of certainty is merely advisory. When it comes to the necessities of the case the lower rule is stated with many illustrations. For example, quoting from 1 Chitty, Cr. Law, 111:

"It is necessary to set forth the particular species of crime . . . with convenient certainty. . . . If the commitment be for felony it ought not to be generally for felony, but it must contain the special nature of the felony briefly; as for felony of the death of J. S. or for burglary in breaking the house of J. S., etc. But though it was formerly thought otherwise, it appears now to be settled, that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime is sufficient. And . . . there are precedents of commitment for felony in general in good authors, without stating the specific accusation. So in *Wilkes' Case*, 2 Wils. 153, 159, a commitment for publishing 'a most infamous and seditious libel entitled "The North Britons," Number 45, tending to inflame the minds and alienate the affection of the people from his Majesty, and to

excite them to traitorous insurrections against the government,' was held sufficient, though it was urged that the libel ought to have been set forth, in order that the court, on a *habeas corpus*, might be able to fix the *quantum* of bail. So it has been held that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without specifying what he said or did, is sufficient. *It is, however, in general advisable to describe the offense concisely but in substance as in an indictment.*"

There is obviously a wide difference between what is advisable and what is necessary in such cases. It would be a mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case. We cite the following additional authorities sustaining the view expressed: *Matter of Howard*, 26 Vt. 205; *People v. Johnson*, 110 N. Y. 134; *Ex parte Willoughby*, 14 Nev. 451; *People v. Gray*, 67 How. Pr. 456; *State v. Killet*, 2 Bailey, Law, 289; *In re Kelly*, 46 Fed. Rep. 653; 4 Ency. of Pl. & Pr. 577, 578, and cases cited.

It follows from what has been said that if the general statement in the commitment, in its literal sense or by reasonable inference, points clearly to the offense intended to be charged, and such offense, so called, is one in fact, for which an accused person can properly be held, the commitment was a complete defense to the *habeas corpus* suit till overturned by some defect of a jurisdictional nature in the proceedings upon which it was based, unless it was fatally defective by reason of the statute (sec. 4774, Stats. 1898). As we have seen, the description of an offense well known to the law, by its generic name, as the offense of arson, burglary, larceny, or murder, by reasonable inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject. *In re Kelly*, 46 Fed. Rep. 653; *Collins v. Brackett*, 34 Minn. 339; and *People v. Johnson*, 110

N. Y. 134, fully cover that question. Applying that rule to the commitment in question, no difficulty whatever is perceived. It says the accused was charged with having committed, on a day named, the offense of conspiring to injure. The use of the term "conspiring" suggests without possibility of doubt that two or more persons were concerned in the offense. The only law in this state making a mere agreement between two persons to do an act injurious to another under any circumstances an offense is sec. 4466*a*, Stats. 1898. Therefore the language "the offense of conspiring to injure," with reasonable clearness refers to such statute. It includes, by inference, a statement of all the facts necessary to satisfy the calls of the statute. The statement of the name of the crime states with convenient certainty the nature thereof and of course suggests the existence of facts necessary thereto. The general statement includes the details, if such general statement is sufficient to suggest them with reasonable clearness. A commitment so drawn as to satisfy the degree of certainty thus indicated is sufficiently precise to satisfy every part of it and is according to the prevailing rule on the subject.

The idea advanced by counsel that the commitment is fatally defective for want of the preliminary words, "against the form of the statute in that case made and provided," can hardly be considered as being seriously urged. There was a time when substance in judicial proceedings was in some respects sacrificed to mere form, or when mere form was considered to be as essential as substance; but in the progress of events the law has developed to a point so far away from such notions that they are regarded as obsolete. So long as the commitment shows that the accused was held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. Any mere formal statement of that, as a concluding phrase in the commitment, was wholly unnecessary.

This court, in *Nichols v. State*, 35 Wis. 308, characterized a useless expression, similar to the one in question, as "a mere rhetorical flourish, adding nothing to the substance of the indictment," and as wholly unnecessary in the absence of a constitutional or statutory mandate making it so. That was affirmed in *Murphy v. State*, 108 Wis. 111. There is no such mandate in the way as to the matter under consideration.

A suggestion is made by one of the learned counsel that the commitment is void because it does not follow strictly the form prescribed by statute, and another says there is no statutory commitment for such a case. The first suggestion will be considered without deciding that the officer in this case was required to use the particular form referred to. Sec. 4740, Stats. 1898, requires a warrant to contain the substance of the complaint on which it is issued, and sec. 4774 prescribes a form of commitment for trial that "*may be* used," which indicates that the offense should be stated "as in the warrant." The rule is that where a form is prescribed by statute it must be strictly followed. That has been held to mean, followed with almost technical accuracy where the language of the statute so indicates. *Keniston v. Chesley*, 52 N. H. 564. But sec. 4774 does not so indicate, unless we read "may" as "must" or "shall" and give thereto its full meaning down to immaterial details. Nothing of the kind, we think, was intended. *Streeter v. Frank*, 3 Pin. 386, did not go that far. It dealt with a material omission from a statutory form. Sec. 4774 is open to a reasonable construction, requiring only that the form be followed strictly as to the substance of things, not literally. There is a difference between following a form literally and following it strictly. The former goes to minuteness of detail in mere matters of form, while the latter may be satisfied by the essential elements. In *Streeter v. Frank* one of those elements was omitted. The words in the form under discussion, "state

the offense as in the warrant," taken in connection with the requirement that the warrant shall recite the substance of the complaint, mean no more than that it shall state the same offense as the one named in the complaint with sufficient accuracy that its identity will appear with convenient certainty. What has been said on another branch of the case as to such degree need not be repeated. The complaint charged in general language, or attempted to do so, and also by all the particulars, the commission of the offense to injure, going further in such particular than the specific offense, created or declared in sec. 4466*a*, though it is plain that such statute was what the complainant had in mind. The substance of the complaint was that the accused were guilty of having committed, on a day named, the offense of conspiring to injure, and that was substantially carried into the commitments.

If we were to hold that the commitments do not show with convenient certainty, within the rules above stated, that the defendants in error were imprisoned to await their trial upon a charge of having violated sec. 4466*a*, Stats. 1898, the circuit court none the less erred in discharging them,—if the complaint upon which they were arrested charged an offense known to the law, and the record of the examination which the court had properly brought to its attention showed that there was evidence tending to support the charge on these two essentials: first, that the offense was committed; second, that there was probable cause for believing that the accused were guilty thereof,—regardless of whether the decision of those questions, or either of them, by the committing magistrate, was right or wrong. That was substantially the rule at common law, and it was preserved by the constitutional grant of power to circuit courts to issue writs of *habeas corpus*, especially since there is no statute in any way restricting the jurisdiction of such courts in that regard. So far as the statutes of this state treat the

subject they confirm and broaden the common-law rule. Express provision is made for bringing to the notice of the court, in a *habeas corpus* suit to vindicate the right of a prisoner, detained for trial upon a criminal charge, to his personal liberty, the record of the examination including the evidence taken, and it is made his duty to examine such evidence, and, if thereby it appear to him that the accused is guilty of the offense, to commit him for trial or admit him to bail regardless of any irregularity in the original commitment. Sec. 3429, Stats. 1898; *State v. Bloom*, 17 Wis. 521. It is also the duty of the court on *habeas corpus* to examine the complaint, and discharge the prisoner if it does not state an offense known to the law; and to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. That is well settled by the authorities. Church, Habeas Corpus, §§ 231, 236; *Matter of Wadge*, 21 Blatchf. 300; *In re Luis Oteiza y Cortes*, 136 U. S. 330; *Nishimura Ekiu v. U. S.* 142 U. S. 651; *Ex parte Bollman*, 4 Cranch, 75, 125. Whatever conflict apparently exists on this question in the books will be found on careful examination not to be a conflict in fact, but is explainable by reference to statutory regulations. We have no statutory regulations in conflict therewith, but on the contrary the statutes of this state substantially declare the common-law rule. True, at common law the writ of *habeas corpus* reached only *jurisdictional* defects; but, as the term is rightly understood, it goes further than counsel for plaintiffs in error seem to concede. Some courts use the term in the restricted sense of jurisdiction of the person and of the subject matter, while others, and those it is believed holding the correct doctrine, extend it to include excess of jurisdiction, treating a decision — other than one upon the trial of an issue — that a complaint is sufficient when it does not state any offense known to the law, or one

that the essential facts exist warranting the commitment of a person for trial on a criminal charge, where there is no competent evidence for the judgment of an examining magistrate to reasonably act upon, as on the same basis as any other jurisdictional defect in the proceeding. That was early declared as the common-law doctrine and the one to be followed where there is no statute affecting the subject otherwise. *Ex parte Bollman, supra.* Chief Justice MARSHALL there said, after recognizing the distinction between imprisonment upon a final judgment and detention under a commitment to stand trial:

"It is unimportant whether the commitment be regular in point of form or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done." Page 114.

"This having been a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held for trial. . . . 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.'" Pages 124, 125.

That declaration has always been adhered to by the federal courts and followed generally by all courts where jurisdiction in *habeas corpus* proceedings, or the practice therein, is not otherwise regulated by statute.

There is no need to go further to demonstrate that the common-law office of the writ of *habeas corpus*, as it came to us and has been preserved by our state constitution, is as indicated by the decision referred to. While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a

criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It cannot go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right.

Counsel for plaintiff in error cite to our attention a large number of cases to support their contention that the circuit court had no jurisdiction to review the evidence, many of which are cases decided by this court. We have taken time to examine each of such cases and are unable to discover that they furnish any support for counsel's position. For example, *Ex parte Jones* (C. C.), 96 Fed. Rep. 200, one of the significant cases referred to, states the rule in the syllabus, which is fully borne out by the opinion, thus:

"The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by *habeas corpus*, but where, although there was evi-

dence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on *habeas corpus*."

The concluding language of the opinion is as follows:

"It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by some one, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner."

The decisions of this court cited, in the main, refer to the scope of the jurisdiction of a court in reviewing the final judgment of another court upon writ of *certiorari* or *habeas corpus*. Manifestly, they do not touch the question here under discussion. Neither a writ of *certiorari* to review a final judgment of a court upon a trial, nor a writ of *habeas corpus* for that purpose, reaches the evidence. That is undoubtedly true. No common-law rule is better settled than that, while the contrary is just as well settled as regards the functions of a writ of *habeas corpus* in testing the legality of a commitment for trial for a criminal offense.

True, as counsel say, the expression has often been used by this court that upon *habeas corpus* proceedings only jurisdictional errors can be considered, and that has been used without qualification and in a way to indicate — to a person who has not in mind the distinction between jurisdiction for the trial and determination of a cause, and jurisdiction to hold a judicial inquiry to determine whether a prosecution shall be instituted — that insufficiency of evidence, no matter how great, cannot be considered, because, the court having jurisdiction of the subject matter and the person, a decision upon insufficient evidence or without any evidence is judicial or mere error, not jurisdictional error. What the court said in each one of the cases referred to was correctly said as applied to the case. The following are some of the cases: *In re Milburn*, 59 Wis. 34; *Wright v.*

Wright, 74 Wis. 439; *In re Graham*, 76 Wis. 366; *In re Rosenberg*, 90 Wis. 581; *In re Meggett*, 105 Wis. 291; *In re Pikulik*, 81 Wis. 158; *In re French*, 81 Wis. 597; *In re Eckart*, 85 Wis. 681. They all follow the well-known rule that where there is jurisdiction to try and determine an issue, there is jurisdiction to commit error to the extent of deciding the ultimate fact involved without competent evidence tending to support it, and that the error can only be corrected upon writ of error or appeal where one is allowed; that the writ of *habeas corpus* or writ of *certiorari* cannot reach the mischief. But a proceeding before an examining magistrate is not a judicial trial. It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res adjudicata* does not apply so that the result of one inquiry will preclude another. It is a proceeding that was unknown to the common law,—a mere statutory creation, a personal privilege which the accused must be accorded unless he waives it. Being statutory and special, evidence tending to establish the facts justifying a commitment or holding to bail for trial, is jurisdictional the same as any other statutory essential. The statute awarding the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence; and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a *quasi*-judicial body, authorized by statute to act only upon evidence, is jurisdictional. The rule in such cases is that a clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error. *State ex rel. Moreland v. Whitford*, 54 Wis. 150;

State ex rel. Wood Co. v. Dodge Co. 56 Wis. 79; *State ex rel. Heller v. Lawler*, 103 Wis. 460. For further authorities to support the views here expressed, see Church, Habeas Corpus, §§ 237-247; *People v. Martin*, 1 Parker, Cr. R. 187; *In re Snell*, 31 Minn. 110; *In re Hardigan*, 57 Vt. 100; *In re Simon*, 13 N. Y. Supp. 399; *State v. Hayden*, 35 Minn. 283; *People ex rel. Van Riper v. New York C. Protectory*, 106 N. Y. 604; *Ex parte Becker*, 86 Cal. 402; *Ex parte Willoughby*, 14 Nev. 451; *Jones v. Darnall*, 103 Ind. 569.

Some writers who have favored the profession with textbooks in recent years, speak of this doctrine as a departure from the common law, through a failure to distinguish between a judicial determination according to the course of the common law and a mere statutory proceeding which, though judicial, is not final in any sense, and is not an action, but a proceeding preliminary to an action. The misconception referred to is very marked in the work of an able writer who cites *State ex rel. Dunn v. Noyes*, 87 Wis. 340, to support a suggestion that this court has not departed from the general rule as to the review of judgments on *habeas corpus* in the treatment of the scope of the writ as regards reaching behind the determination of an examining magistrate. That case did not deal with anything but the general rule, that only jurisdictional defects can be reviewed on *habeas corpus*, and the one that a *de facto* judicial officer or body has the same jurisdiction as any other as regards collateral attack. The case is in harmony with the idea that some evidence is necessary to preclude successful collateral attack upon an examining magistrate's conclusion because that is a statutory requisite thereto.

Independently of the common-law rule it has been repeatedly held, in states having statutes similar to ours, that they contemplate the examination of the proceedings before the committing magistrate, where properly brought to the attention of the court on *habeas corpus* proceedings, so far

as necessary to determine whether the magistrate acted upon competent evidence tending to establish the facts; and also the introduction of new evidence on issue joined as provided. *People ex rel. Van Riper v. N. Y. C. Protectory*, 106 N. Y. 604; *People v. Richardson*, 18 How. Pr. 92; *Matter of Henry*, 13 Misc. (N. Y.), 734; *People v. Tompkins*, 1 Parker, Cr. R. 224. In the report of *People v. Martin*, 1 Parker, Cr. R. 187, there is a full review of American and English authorities, and as a result it is said, reading from the syllabus:

"In criminal cases where an indictment has been found, the court, upon *habeas corpus*, cannot go behind the indictment because there are no means of ascertaining upon what it was found. But on a commitment before indictment the whole question of guilt or innocence is open for examination on the return to the writ of *habeas corpus*, and the inquiry is not necessarily confined to an examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on *habeas corpus* are in the nature of an appeal from the decision of the committing magistrate."

It is not to be understood by that language that the court held that, on such appeal, so called, the court could go further in reviewing the decision of the committing magistrate on the evidence on which he acted than to determine whether it furnished some reasonable ground for a decision. Church, in his work on Habeas Corpus, expresses the view that such statutes as those in New York and in this state are mere declarations of the common law. He is borne out by the holdings of the New York court, but we need not discuss that subject here. It is quite clear, though, that ch. 147, Stats. 1898, was intended to cover the entire field of practice in *habeas corpus* suits so far as relates to original proceedings. The scope of sec. 3425 is broad enough, if a statute was required on that question, to enable the petitioner for writ of *habeas corpus*, by his petition, to bring to

the attention of the court all the proceedings before the committing magistrate or by presenting the same as evidence in support of his answer to the return, where such answer contains allegations rendering such proof competent. Sec. 3427 precludes examination into the proceedings upon which the determination of the court was had in committing the person, only when such detention is upon a final judgment or order. That manifestly does not include a determination of a mere judicial inquiry. Sec. 3429 refers to the former section and contemplates the examination of evidence produced before the examining magistrate where it is properly brought to the attention of the court.

Sufficient has been said to demonstrate that counsel for plaintiff in error have confused the scope of a *habeas corpus* suit calling in question the validity of a final judgment or order and the scope thereof as to reaching the proceedings of a committing magistrate. It is not understood, it seems, that failure to comply with the statute requiring such magistrate, in his inquiry, to act upon evidence, is not an error committed in acting within this jurisdiction, as is the act of entering a judgment, by a court, upon the trial of an issue, without competent evidence to warrant it,— but is error in going beyond his jurisdiction. The general rule invoked by counsel is as claimed, but the application of it contended for is wrong.

The point made by counsel for plaintiff in error that the circuit court erred in going beyond the warrant of commitment and examining the complaint, and that it would have been error to have taken into consideration the evidence given before the committing magistrate, which was properly produced as part of the *habeas corpus* proceedings, cannot be sustained. The position of counsel for defendants in error, that the question of whether the complaint states any crime known to the law, and that of whether there was any evidence tending to show the facts essential to the de-

tention of the accused for trial upon the charge, were open, is approved.

The doctrine is invoked by the learned counsel for defendant in error *Melvin A. Hoyt*, that "where concert of action is necessary to the offense, conspiracy does not lie." That principle is familiar, but its application, as its language clearly indicates, is necessarily confined within very narrow limits. It does not reach a situation where mere combination to effect an object is itself criminal and not merged in a crime of higher degree, else the absurd result would follow that the offense of conspiracy would be impossible either at common law or under the statute. The rule applies where the immediate effect of the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as for instance, in the offense of adultery, or bigamy, or incest, or dueling. That illustration, in a different way, is given at § 1339, Whart. Cr. Law, which is cited to our attention and relied upon by counsel, but which, as it seems, is wholly misunderstood in urging it upon the attention of the court as applicable to the facts of this case. Where an act is of itself an offense, as that of adultery, it cannot be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent concurrence is the wrongful agreement; that of the object thereof is the adulterous act. In the latter there is the element of *concursus necessarius*,— the concurrence in the ultimate act constituting the crime, precluding its being prosecuted as the crime of conspiracy. In the former there is also the element of *concursus necessarius* in that at least two persons

are necessary to a combination or agreement. But there is also the element of *concursus facultativus*, making it a distinct offense. Those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act the combination was formed to bring about may be prosecuted for that, though the effect thereof be to prosecute one of the parties for both offenses. In the latter the plurality of agents, really, as Mr. Wharton says, in effect, is in aid of the conception to commit the ultimate act of adultery. In the former the plurality of agents is as necessary to the full conception of the offense so as to preclude the possibility of failure thereof, as to the consummation of the offense itself. In the one, concert is essential to the act and a necessary part of it; in the other, concert, itself an offense, is a mere aid to the act which is the ultimate purpose thereof,— a purpose that is susceptible of being abetted without, though not as effectually as with, the specific, independent act of combination. It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for each as a distinct offense would place the parties twice in jeopardy, that the rule applies.

Shannon v. Comm. 14 Pa. St. 226, and *Miles v. State*, 58 Ala. 390, cited by counsel to sustain his view, are in harmony with what has been said. In the first case cited the rule is stated thus: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act." That is, as applied to this case, if the mere infliction of an injury to The Journal Company in its business was a criminal act, and obviously it was not such, the infliction thereof by two persons acting in concert and by mental concurrence could not be prosecuted as a conspiracy. But, as said in *Shannon v. Comm.*, where an act is an inte-

gral offense and not an integrant part of one, a guilty participant may be prosecuted for both. The term "act" as there used manifestly refers to an act which is illegal in the sense that it is wrong, tested by the rules of good morals. In this case the sole offense, if any is charged, is the combination of several persons wilfully and maliciously to injure The Journal Company in its business. There is no room whatever for saying that the prosecution for that offense would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were attempted to be prosecuted for a conspiracy to commit that offense. The fact that it would not be practicable or even possible in such a situation for one person alone to commit the act, i. e., of injuring the business of The Journal Company, which is the alleged object of the combination, does not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring to wilfully and maliciously injure The Journal Company in its business. Counsel admits that there is a dearth of authority to support the application contended for, of the principle under discussion. He failed to cite to the attention of this court any that meet the situation when fairly analyzed, while the explanation of the rule we have given, showing that it has no application to the prosecution under discussion, is supported by ample authority, as it is by reason and common sense. We cite the following: *U. S. v. Stevens*, 44 Fed. Rep. 132; *U. S. v. Boyden*, 1 Lowell, 266; *Reg. v. Boulton*, 12 Cox, Cr. Cas. 87; *U. S. v. Rindskopf*, 6 Biss. 259; *U. S. v. Bayer*, 4 Dill. 407; *State v. Sprague*, 4 R. I. 257; *Ochs v. People*, 124 Ill. 399, 426; *Reg. v. Whitchurch*, 24 Q. B. Div. 420; *U. S. v. Martin*, 4 Cliff. 156; *Reg. v. Rowlands*, 5 Cox, Cr. Cas. 466. In *Reg. v. Whitchurch*, a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all the parties concerned

in the combination could be prosecuted for the offense of conspiracy. Lord COLERIDGE, C. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the offense." In *U. S. v. Bayer* the facts were these: Under the statutes of the United States on the subject of bankruptcy there was an offense that could be committed only by the bankrupt. Such person and others colluded together to facilitate the commission of the offense by him. All were prosecuted for the offense of conspiracy and the prosecution was sustained. DILLON, J., in delivering the opinion of the court, said, in the main, 'Conspiracy to commit a crime is of itself criminal at common law. The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it.' In that situation the conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been committed is no legal bar to a prosecution for the conspiracy. In *Ochs v. People*, *supra*, it was said that it is not essential to a conspiracy that the object thereof be possible. We will not further discuss this question. It is not improbable that more has been already said than is warranted in its proper solution. We confess that when it was first suggested on the oral argument it hardly seemed to be worthy of serious attention or that the learned counsel so supposed. But an examination of the full discussion of the subject in counsel's brief satisfies us we were at least in error as to the state of his mind, and we have treated it accordingly and put all the labor upon it which the gravity thereof would call for if there were a reasonable doubt, before a study of the subject, as to whether the case might turn upon its solution.

We have now considered, we believe, all the important contentions and suggestions advanced by counsel for the respective parties, which from any point of view could stand in the way of an examination of the complaint and the evidence, assuming, without intending to decide, as yet, that sec. 4466*a*, Stats. 1898, is a valid provision of law. It has been seen that the commitment, on its face, justified the sheriff in holding the defendants in error to await their trial for a violation of such section, and that it was competent for the circuit court, in the *habeas corpus* suit, the proceedings before the examining magistrate having been duly presented for consideration, to go behind the commitment and determine whether the complaint, by any reasonable construction, stated an offense within the meaning of such statute, and whether there was any evidence tending to establish the two essentials for holding the accused for trial, i. e., that the offense charged had been committed and that there was probable cause to believe the accused guilty thereof. Sufficient has also been said to show that the general language of the complaint, standing alone, to the effect that the accused did, on a day and at a place named,—which satisfied the requisites of the statute to that extent,—concert together with intent maliciously to injure The Journal Company and the other persons named, in their trade and business, sufficiently charged the doing of those acts made an offense by the statute. That such general language substantially follows sec. 4466*a*, and that such section is the only statute making a conspiracy without an overt act a criminal offense, is not questioned. It follows that the complaint must be construed with reference to such statute, and be held to satisfy it unless the general language thereof is connected with allegations which take therefrom some essential element.

At this point we meet the claim of counsel for defendants in error that the statement of the particulars of the alleged

wrongful agreement, and of the acts done pursuant thereto, explains the meaning of the general charge and in that way renders the complaint insufficient. To that, answer is made by counsel for plaintiff in error that the allegations as to acts done pursuant to the conspiracy were unnecessary, the offense being complete as soon as the agreement was made to commit the malicious injury, therefore that such allegations should be rejected as surplusage. That is undoubtedly a correct rule, but no reason is perceived why the statement of the particulars of the agreement can be rejected. It is plain that, while the complaint states generally an agreement to maliciously injure the persons named in their trade and business, in the terms of the statute, and then states that the members of the unlawful combination, pursuant to their unlawful purpose, agreed to do certain specific acts mentioned, the real purpose of the complainant was to state but one offense,—not an unlawful conspiracy to injure, generally, the persons named in their business and also an unlawful conspiracy to injure them in such business in a particular way. The facts were stated first according to their legal effect and second in detail. That is the only reasonable construction of the complaint. It should be read as if the language were to the effect that the accused maliciously conspired together to maliciously injure the persons named in their business, in that they agreed and concerted together, in manner and form as stated in the statute, to maliciously injure such persons by doing the particular things alleged. That was the conclusion reached by the circuit judge. He disposed of the case at that point on a supposed insufficiency of the complaint. If he had gone further and examined the evidence the result would not have been different; for that only tended to establish the truth of the complaint. Viewed in the light of the particular allegations as to the nature of the combination, the evidence, for that purpose, was ample to give the examining magistrate jurisdiction to pass upon

the truth of such allegations to the extent necessary to hold the accused to trial.

At this time it seems necessary to restate the charge contained in the complaint as we have construed it. Upon that turn the remaining questions to be considered.

According to the complaint it was in substance agreed between the defendants in error *Melvin A. Hoyt*, representing The Daily News, *Albert Huegin*, representing The Milwaukee Sentinel, and *Andrew J. Aikens*, representing The Evening Wisconsin,—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by The Journal Company, the publisher of a newspaper called The Milwaukee Journal, also a medium for advertising business,—that whereas the latter had raised its rates twenty-five per cent. above those customarily charged for such service by it and the proprietors of the other papers named, if any person agreed to pay or paid The Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay The Journal Company said increased rates for advertising in its paper, should have the privilege of advertising in any or all of the other papers at the old rate. Now, it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by the statute can arise; that such intent means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The malice of the statute is evidently malice in law, not necessarily ill-will or malice in fact. It means, as is commonly said, a wrongful act done intention-

ally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business, or profession. If we can see in the agreement, by reasonable inference, the independent purpose to harm The Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that every one is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole, end in view was to force The Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it and one of them in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors. If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling The Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of The Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any benefit that could be suggested would be so remote and trifling as not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial contemplated benefits to the mem-

bers of the combine could have been expected, and that is this: Assuming that the reasonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of The Journal Company's paper were so great that rather than forego the use thereof, it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an intent to harm The Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure The Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but those parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the reargument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person, acting by himself, or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations,— with such success in fact that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that, as regards combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common-law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of constitutional safeguards, to say that things are contrary to public policy not so before, to legislate against them, and to enforce the legislative will by civil or criminal liability, or both:— within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests

concerting together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies. Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: *U. S. v. Addyston P. & S. Co.* 85 Fed. Rep. 271; *U. S. v. Trans-Missouri F. Asso.* 166 U. S. 290; *Gibbs v. McNeeley*, 102 Fed. Rep. 594; *Nester v. Continental B. Co.* 161 Pa. St. 473; *People v. Sheldon*, 139 N. Y. 251; *Jackson v. Stanfield*, 137 Ind. 592; *People ex rel. Morse v. Nussbaum*, 32 Misc. (N. Y.), 1; *Leonard v. Poole*, 114 N. Y. 371; *People v. Milk Exchange*, 145 N. Y. 267; *Ford v. Chicago M. S. Asso.* 155 Ill. 166. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few

that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the states of the Union, as well as by the federal Congress, and that in but very few instances has such an enactment met the bar of the constitution of state or nation. A late work that treats of police powers, sums up the subject here under discussion thus:

"It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully questioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law,— so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements,— has been too long the settled rule of law, to admit of any serious question now. And the power of the state to declare such contracts unlawful being conceded, it is completely within the discretion of the legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the courts or the parties to them be subjected to criminal or civil liabilities." 1 Tiedeman, State & Federal Control, § 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous state statutes to which we have referred, condemning combinations in restraint of, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and

punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect, where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens v. Reilly*, 109 Wis. 464. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases, as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be rewritten. The following are the cases referred to: *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598, *S. C.* decided in House of Lords and reported in [1892] App. Cas. 25; and *Huttley v. Simmons*, [1898] 1 Q. B. Div. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages. In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. BOWEN, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among

several." "A combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." FAY, L. J., said: "I lay out of consideration in this case competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord HANNEN said: "I known of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." The *Mogul S. S. Co. Case*, as appears from the opinions rendered in both courts, is full of expressions showing that it was not supposed then that an act, not actionable if perpetrated by one, could not be made so when perpetrated by several in combination, or that liberty to form business combinations to promote the business of the members thereof in the free course of trade, applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the *Mogul S. S. Co. Case* on its face. We should say, that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with many decisions cited and approved in the opinions, a good instance being *Gregory v. Duke of Brunswick*, 6 Man. & G. 205, where it was held that preconcerted hissing of an actor for the purpose of injuring him in his profession, was actionable. That and many other cases decided on the same principle were approved. If we say that such principle had prevailed in the English

courts for two centuries prior to the *Mogul S. S. Co. Case*, we are supported by the lord chancellor in *Allen v. Flood*, [1898] App. Cas. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds in the *Mogul S. S. Co. Case*, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with *Gregory v. Brunswick*, where the conspirators were held liable because of their malicious purpose; and *Clifford v. Brandon*, 2 Camp. 358, a similar case; or *Garret v. Taylor*, Cro. Jac. 567, where malicious impeding of workmen was held actionable,—the authority of which, up to *Allen v. Flood*, had never been questioned. Those simple cases contain all the principles which govern this case, on the particular question under discussion.

The decision in *Allen v. Flood* was not reached by any great weight in number. Lord WATSON, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for 200 years; that it was a departure from the principle that had theretofore guided the courts in the pres-

ervation of individual liberty. He cited numerous expressions of the character of those which we have quoted from the opinions of the judges in the *Mogul S. S. Co. Case*, and said that, "if the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would have been the other way." Lord MORRIS said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After *Allen v. Flood*, [1898] App. Cas. 1, it was but a step to reach *Huttley v. Simmons*, [1898] 1 Q. B. Div. 181. The conclusion there was in harmony with what Lord HALSBURY evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the *Mogul S. S. Co. Case* and that of *Allen v. Flood*, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done and in fact done, would have been, without preconcert, actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley v. Simmons*, has to some extent influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time, been adopted here in any material degree. In courts where it has been partially adopted there have often been most vigorous dissents, as, for example, *Passaic P. Works v. Ely & Walker D. G. Co.* 105 Fed. Rep. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of *Huttley v. Simmons*:

"If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically

correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion. . . . But, notwithstanding the decision in *Huttley v. Simmons*, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action." Sec. 503.

In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conclusion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow *Huttley v. Simmons*, would be to overrule those cases. *Bratt v. Swift*, 99 Wis. 579; *Milwaukee M. & B. Asso. v. Niezerowski*, 95 Wis. 129; *Gatzow v. Buening*, 106 Wis. 1. The great weight of authority, almost all authority, is to the same effect. We give a few citations. 1 Hawk. P. C. 446, § 2; *State v. Stewart*, 59 Vt. 273; *Carew v. Rutherford*, 106 Mass. 14; *Ertz v. Produce Exchange*, 79 Minn. 140; *State v. Buchanan*, 5 Har. & J. 317; *Comm. v. Waterman*, 122 Mass. 57; *Farmers' L. & T. Co. v. N. P. R. Co.* 60 Fed. Rep. 803; *State v. Norton*, 23 N. J. Law, 33; *State v. Glidden*, 55 Conn. 46; *Sherry v. Perkins*, 147 Mass. 212; *Smith v. People*, 25 Ill. 17; *Crump v. Comm.* 84 Va. 927; *Doremus v. Hennessy*, 176 Ill. 608.

In the last case above cited, PHILLIPS, J., speaking for the court, summed up the subject under discussion thus:

"Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition

of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

That expresses the common-law doctrine and the one that prevails here. How contrary it is to *Huttley v. Simmons*, [1898] 1 Q. B. Div. 181, appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade and render combinations successful by the malicious destruction of the business of competitors is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the *Mogul S. S. Co. Case*. So far as then developed they were presented in *Farmers' L. & T. Co. v. N. P. R. Co.* 60 Fed. Rep. 803, and rejected, the learned circuit judge who wrote the opinion quoting with approval from *Comm. ex rel. Chew v. Carlisle*, Brightly, N. P. 36, the following:

"It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a con-

spiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves,— to wrongfully harm such competitors merely because they insist upon individual right to conduct individual business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for sec. 4568, Stats. 1898, adding to the common-law essentials of an indictable conspiracy the necessity for an overt act, sec. 4466*a* would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of sec. 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy to injure the trade, business, reputation, or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing sec. 4466*a*. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that *De minimis non curat lex* applies; but when he unites others with him to maliciously injure the business of another for the mere grat-

ification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' L. & T. Co. v. N. P. R. Co.* 60 Fed. Rep. 803, the union of individual forces by agreement, to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: the term "malicious injury," as used in the statute, is synonymous with that term at the common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not, in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to

combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more to wrongfully accomplish harm to another in the line of those things mentioned in the statute. It is in harmony with the doctrine, so definitely stated by Baron BRAMMEL in *Reg. v. Druitt*, 10 Cox, Cr. Cas. 593, that it has often been quoted by courts and text-writers and nowhere rejected: "The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they are guilty of a criminal offense."

By the Court.— The orders of the circuit court discharging the defendants in error are severally reversed, and the cause is remanded with directions to remand them to the sheriff of Milwaukee county.

DODGE, J., took no part.

THE AULTMAN COMPANY, Appellant, vs. MCDONOUGH, Respondent.

February 26 — April 30, 1901.

Replevin: Pleading: Counterclaim: Verdict: Breach of warranty: Principal and agent: Rescission: Ratification: Evidence: Damages.

1. In an action of replevin, brought by a nonresident mortgagee to recover possession of machinery sold to defendant and mortgaged to secure the purchase price, the defendant, under subds. 1 and 3, sec. 2656, Stats. 1898, may counterclaim damages for breach of warranty of the goods sold, and also damages in trying to operate machinery returned to the plaintiff and for which the mortgaged property was in part taken in exchange.

2. In an action of replevin where the answer demands judgment for a return of the property described in the complaint and damages for the unlawful seizure thereof, a verdict which finds the value of the property at another time than that at which it was seized in the action, and fails to find that the defendant was entitled to a return thereof and to assess his damages for such wrongful seizure, does not comply with sec. 2859, Stats. 1898, and will not support a judgment, the provisions of sec. 2888 requiring the judgment to be based upon, and to conform to, the verdict.
3. Where an engine is sold under a warranty and is found defective, the substitution of another engine in its place, the changing of the contract as to the purchase price, and the giving of additional notes secured by mortgage, do not constitute such a complete rescission of the first contract, so far as the first engine was concerned, as will prevent the recovery of damages for any breaches of warranty as to such engine, and damages for loss of time and expenses in trying to make it do good work, it being expressly agreed that the transaction should not have that effect.
4. Where the agent of the seller, in such a case, employed for the purpose of closing the deal, arranges with the purchaser to substitute a different engine and contract, it will be presumed, in the absence of contrary evidence, that he was authorized to agree to a condition that such change should not defeat the purchaser's claim for damages.
5. In such case the principal cannot ratify the transaction so far as to retain the new notes, the mortgage securing them, and the first engine, and at the same time repudiate it as to the reservation of the right to such damages.
6. When an engine is sold under a warranty, and it fails to comply therewith, but the seller requests the purchaser to continue to use and repair it, and promises to pay for the loss of time and repairs, the purchaser may recover special damages for loss of time and expenses in attempting to make the engine work.

APPEAL from a judgment of the circuit court for Marquette county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

For the appellant there were briefs by *Hall & Sheldon* and *John Barry*, and oral argument by *F. W. Hall.*

For the respondent there was a brief by *Fowler & McNamara*, and oral argument by *C. A. Fowler.*

CASSODAY, C. J. It appears from the record that July 16, 1898, the plaintiff sold and delivered to the defendant a rebuilt second-hand separator, and a ten-horse Star engine on trucks, with the usual fixtures and extras, for $650, of which $200 was paid down in cash, and three notes, of $150 each, secured by chattel mortgage on the property, taken for the balance; that after using the same for some time the engine was found to be unsatisfactory to the defendant, and so it was returned, and a rebuilt Gaar-Scott engine taken in its place, with an agreement on the part of the defendant to pay to the plaintiff $300 additional, evidenced by three promissory notes of $100 each, all the six notes amounting to $750 to be secured by chattel mortgage on the property. When the first note for $150 became due, the defendant made default and refused payment, which had been demanded, and thereupon the plaintiff demanded possession of the property covered by the mortgage, which the defendant refused to give. May 3, 1899, the plaintiff, as such mortgagee, commenced this action of replevin for the property covered by the second mortgage.

The defendant, by way of answer and counterclaim, denied certain allegations of the complaint, and admitted others, to the effect that he purchased the first machinery in July, 1898, and made the cash payment and gave the three notes and chattel mortgage, as stated, but alleged that the engine was to be rebuilt, and was warranted and guaranteed to be in perfect working order, and that it would perform the work of running the separator and attachments, and would be perfectly satisfactory; that the defendant purchased such property relying wholly on such warranty and guaranty; that it was not rebuilt as agreed, but was fraudulently covered with a thick coat of paint to conceal the rust and worn condition; that it was so old, worn out, rusted, and dilapidated and out of repair as to be impossible of use; that at the request of the plaintiff the defendant

continued to try to use the same, and to put and keep the same in repair, on the promises of the plaintiff that it would make the matter right, and afterwards that it would procure another engine for the defendant as soon as it could get a suitable one, and that it would make good the defendant's loss of time and damage by reason of such defects; that the defendant lost two thirds of his time in consequence, and did not do more than ten days' work therewith during the two months and over that he was trying the same; that, by and in consequence of such failure and breach of warranty, the defendant was damaged in the sum of $450. The answer also admitted that the plaintiff took back such first engine, and delivered to the defendant another, for which the defendant agreed to pay $300 additional, and did give three notes in addition to the three already held by the plaintiff, all secured by chattel mortgage on such second engine and machinery, as stated, but alleged that the defendant took such second engine on the plaintiff's agreement and warranty that it would make good to the defendant the damages he had sustained by reason of such failure of the first engine, and warranted and guaranteed the second to be rebuilt, and to work as good as new, and to do the work of running the separator and corn sheller perfectly and satisfactorily; that the second engine failed to do such work as warranted and guaranteed; that, in addition to lesser defects, the pump and injector of the engine were defective, worn, and out of order, and would not work, and in consequence thereof the whole engine was useless; that the plaintiff was forthwith notified of such defects, and it agreed to replace and repair the same, but failed; that, in pursuance of the plaintiff's request to keep trying to use such engine, the defendant lost one half his time, and his custom and patronage, and was obliged to quit work; and that in consequence of such breach of warranty of the second engine the defendant sustained damages to the amount of $400. The answer prays judg-

ment that the aggregate amount of damages which the defendant has thus sustained, $850, should be applied as an offset to the payment and satisfaction of the six notes and chattel mortgage, and that such notes be canceled and surrendered, and that the defendant should recover from the plaintiff, in addition, by way of damages, $100, together with his costs and disbursements herein. The plaintiff, replying, took issue with the several allegations of such counterclaim.

At the close of the trial the jury returned a special verdict to the effect (1) that there was a breach of the plaintiff's warranty upon the second engine delivered to the defendant; (2) that the second engine, as delivered to the defendant, was worth $275; (3) that the second engine would have been worth, had it been as warranted by the plaintiff, $750; (4) that the defendant's damages by virtue of his loss of time and expenses for repairs in running the second engine were $85.25; (5) that the defendant's damages by reason of loss of time and expenses for repairs in running the first engine were $228. Upon such verdict the court adjudged and decreed that the plaintiff deliver to the defendant the notes and mortgage described in the complaint, and the same were thereby adjudged paid and canceled; that the plaintiff return to the defendant the property replevied therein; that the defendant have and recover of the plaintiff the amount of $2.45, by which his damages exceeded the amount of the plaintiff's notes at the time of the seizure; that the defendant have and recover of the plaintiff his costs and disbursements herein, taxed at $83.83; that, in the event that the plaintiff shall fail to return the property to the defendant within thirty days after the service of notice of the entry of this judgment, the defendant have and recover of the plaintiff the additional sum of $475, which is hereby found and adjudged by the court, upon the evidence adduced herein, to be the value of the said property at the time it

was seized by the plaintiff under the writ of replevin herein, together with $33.25, the interest thereon from May 3, 1899, the date of its seizure. From the judgment so entered, the plaintiff brings this appeal.

As indicated in the statement, the plaintiff, as mortgagee, brought this action of replevin by reason of the defendant's default in payment of a part of the purchase price of the machinery covered by the mortgage. The right to maintain such an action is undisputed. *Gage v. Wayland*, 67 Wis. 566; *Rice v. Kahn*, 70 Wis. 323; *Hill v. Merriman*, 72 Wis. 483. Of course, the plaintiff's special interest in the property is limited by the amount of the mortgage debt. *Gage v. Allen*, 84 Wis. 323.

The defendant, by way of counterclaim, sought to extinguish or reduce such special interest by alleging damages for the breach of warranty on his purchase of the engine covered by the mortgage, and also damages for loss of time and expenses in trying to operate the engine returned to the plaintiff, and for which the engine covered by the mortgage was, in part, taken in exchange. Such counterclaim arose out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and is connected with the subject of the action, within the meaning of the statute, especially as the plaintiff is a nonresident. Subd. 1, 3, sec. 2656, Stats. 1898.

The statute provides that, "in an action of replevin, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property if their verdict be in favor of the plaintiff, or if they find in favor of the defendant that he is entitled to a return thereof, and may at the same time assess the damages, if they are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking or withholding such property." Sec. 2859. Here the defendant, by his answer, did claim

"the return of the property in the complaint described, and for damages for the wrongful seizure thereof." Nevertheless the jury failed to assess the value of the property when seized in replevin, and also failed to find that the defendant was entitled to a return thereof, or to assess his damages for such wrongful seizure, as so claimed in the answer. So the verdict does not conform to the requirements of the statute. The value of the engine replevied, as found by the jury, relates to the time when it was delivered to the defendant by the plaintiff, and not to the time it was seized in this action. The statute also provides that "if the property have been delivered to the plaintiff and a defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same." Sec. 2888. Such judgment is, of course, to be based upon and conform to the verdict thus prescribed. There was nothing in either of those sections of the statute to preclude the court and jury from determining the questions of damages alleged in the counterclaim, and put in issue by the reply. Such alleged cause of action for damages for breach of warranty was properly one triable at law, and by a jury. Up to the rendition of the verdict, it was treated by the trial court and the respective counsel as an issue to be tried by a jury, and was so tried. True, the prayer of the answer is for equitable relief, as well as legal relief; and upon the rendition of the verdict the trial court assumed full equitable jurisdiction, and entered a decree or judgment as indicated in the statement. Where a case involves two causes of action, one legal and the other equitable, the latter should, as a general rule, be first tried by the court. *Harrison v. Juneau Bank*, 17 Wis. 340; *Gunn v. Madigan*, 28 Wis. 158; *Cameron v. White*, 74 Wis. 427.

Counsel for the plaintiff contends, in effect, that the taking back of the old engine by the plaintiff, and delivering

to the defendant the second engine in its place, and the giving of the three additional notes therefor by the defendant, as stated, constituted a complete rescission of the first contract, so far as the first engine was concerned, and a complete satisfaction of any breaches of warranty as to that engine. Such would seem to be the inference, were it not for the fact that there is evidence on the part of the defendant tending to prove that in making such deal he expressly reserved the right to recover damages under the warranty of that engine for loss of time and expenses in trying to make that engine work, and that the plaintiff's agent with whom such new deal was perfected expressly agreed that the plaintiff would settle with the defendant for such damages when his notes became due. It is claimed that the agent had no authority to bind the plaintiff in that respect. But he was the plaintiff's agent for the purpose of closing the deal, and it is not made to appear that he did not have such authority. Certainly the plaintiff cannot ratify the transaction so far as to retain the three additional notes and mortgage and the old engine, and at the same time repudiate it as to such reservation of right to such damages.

Error is assigned because the court allowed the defendant to recover damages for the loss of time and expenses in trying to make the first engine work,—especially for the length of time indicated. But it is alleged in the answer, in effect, that by the request of the plaintiff the defendant continued to try to use that engine, and to put and keep the same in repair, and that he did so upon the plaintiff's promise to make the matter right and make good such loss of time and damage. There appears to be some evidence to prove such allegations. The same is true, to a certain extent, as to the second engine. Undoubtedly, it is competent to allege and prove special damages arising directly out of special circumstances. *C. Aultman & Co. v. Case*, 68 Wis. 612. The general rule as to the measure of dam-

ages in such cases is well understood. *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, 608; *Parry Mfg. Co. v. Tobin*, 106 Wis. 290. We are forced to the conclusion that there was a mistrial in this case.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BELL, Appellant, vs. GUND, Respondent.

April 9 — April 30, 1901.

Master and servant: Contract of employment: Consent to discharge: Evidence.

1. Where a servant, employed for a definite term, consents to the termination of his relations with his employer when he is discharged, he cannot recover wages for the balance of his term.
2. In an action by a servant, who claimed to have been wrongfully discharged before the expiration of his term of employment, to recover for wages which accrued after the discharge, the evidence — stated in the opinion — is *held* to sustain a finding of the jury that such termination was by the consent of both parties.
3. In such a case, letters of the servant, written after his discharge but before the expiration of the term, are competent as admissions on his part, so far as they are inconsistent with his claim that he was discharged against his will.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to recover on a contract of hiring. Plaintiff claimed he was employed by defendant's general manager of a sawmill business at Iron River, Wisconsin, as bookkeeper in such business for three years, from November 20, 1894, at $1,000 for the first year and $1,200 per year thereafter; that he commenced work under such contract and continued till August 1, 1896, when he was discharged without his consent; that he was able to earn, during the rest of

his term of employment, but $549.66, leaving $1,177.68 as the balance which he could have earned but for such discharge. The action was to recover that sum on the facts stated.

Defendant denied that his general manager had authority to hire plaintiff for three years, admitted that plaintiff was hired for a time as bookkeeper, and that he served in that capacity from November 20, 1894, till he was discharged, August 1, 1896, and alleged that he left such employ voluntarily, and that he was paid in full for services actually rendered and a consideration in settlement of his claims under his alleged contract.

The jury found specially that defendant's agent, pretending to have authority so to do, engaged plaintiff as bookkeeper for defendant in his saw-mill business, for three years; that the agent did not have such authority; that such want of authority was never waived by defendant; that plaintiff received pay for all services actually rendered under such contract, and that he voluntarily ceased work August 1, 1896.

Judgment was rendered for defendant and plaintiff appealed.

For the appellant there was a brief by *Alvord & Dillon*, and oral argument by *E. C. Alvord.*

For the respondent there was a brief by *Bleekman & Bloomingdale*, and oral argument by *F. H. Bloomingdale.*

MARSHALL, J. Several questions are discussed in the brief of appellant's counsel, and presented for consideration on appropriate assignments of error; but the conclusion which has been reached as to one of them renders the others immaterial. If plaintiff consented to the termination of his relations with defendant when he was discharged, his subsequent claim for wages for the balance of his alleged term was without any foundation, even if it be a fact that when

he was discharged a binding contract for such term existed. So if the finding of the jury on that question cannot be disturbed, a discussion of other questions is useless.

We should say in passing that, while there are assignments of error on rulings on evidence, they do not challenge any such ruling bearing on the vital question mentioned.

Counsel for plaintiff maintain that there was no evidence tending to show that plaintiff consented to terminate his contract, except some letters written by him between June 14, 1896, and August 30, 1896, and that they ought not to be considered because they were written after such termination. There seems to be no foundation for that contention. True, the letters were written after the occurrence that led to the termination of the employment, but not after the latter event. But if it was otherwise, we know of no reason why they were not competent as admissions by plaintiff, so far as inconsistent with his claim that he was discharged against his will. They certainly tended to show that he not only made no objection to such discharge, but that it was with his entire approval. One written July 14, 1896, referred to the circumstance that land was to be deeded to him by defendant and that he was about to engage in the business of farming thereon. In a letter written July 22d, he stated that he should move onto his land by August 15th. In a letter of July 23d, he again spoke of his contemplated farming venture and asked advice about obtaining a team. Other letters show that plaintiff fully matured his plans to take up the business of farming before he was discharged. The mill business had been sold and the need for plaintiff's services was about to cease, when most of the letters were written. They all indicate that plaintiff had fully settled upon the plan to go to farming when such need was at an end. There is not a hint or a suggestion in any of them that he had any right to demand employment by defendant

for any certain time, or that the approaching final termination of his employment was viewed as a pending violation of his rights. In the letter written August 23d, he spoke of working on his land and of a contemplated winter's work thereon, cutting cedar timber and preparing it for market, stating that, though it would take him a couple of weeks to get in fair condition for that kind of labor, he thought he should like the change and suggested that defendant lend kindly aid in finding a market for his cedar. In a letter of August 16th he expressed satisfaction with his change of vocation. That was followed by other letters of the same tenor. October 22d he wrote requesting a check for the balance of his wages, and stated that his hopes for business in getting out ties had been somewhat disappointed and that in his opinion he would have to look for a job somewhere. Up to that time, it seems, the expected pleasure and profit of farming and obtaining an income from the cedar on his land had failed to materialize. His hopes in that regard were so impaired by experience that he began to think the position of a bookkeeper preferable to his new vocation. Theretofore all the letters written to defendant were in a very friendly and cheerful vein, clearly recognizing the fact that the relations between them as employer and employee were at an end. But on November 23, 1896, the scene entirely shifted. He then, by a short letter, pointedly informed defendant that he should hold him liable on the three-year contract. Defendant testified, in substance, that after a conclusion was reached to sell the mill business, he talked the matter over with plaintiff, and that the latter then said he was sorry to lose his job, but had been thinking for some time that he would like to go farming; that after the sale was made he, defendant, had a conversation with plaintiff, when for the first time he was informed of the alleged three-year contract; that plaintiff was then unable to, or at least did not, produce the contract; that de-

fendant notified him that he was ignorant of any such contract and would not recognize it as his if it existed; that the result of the dispute, and of plaintiff's desire to become the owner of lands owned by defendant, for a farm, was that a full settlement was arrived at by the terms of which plaintiff agreed to release all claims against defendant and the John Gund Lumber Company, particularly all claims under the alleged three-year contract, and defendant agreed that plaintiff should have six forties of land; that his services should not terminate till August 1, 1896; that he should have, in addition to wages, $150, and interest for three years on the deferred payments upon the land; and that the settlement was fully carried out. Plaintiff admitted that a conversation occurred at the time stated by defendant but denied any settlement of his claim under the three-year contract. He admitted payment of the extra $150, but claimed that such payment was for extra services. There was considerable other evidence on the subject. A particular reference to it would not materially change the situation exhibited by what has been said. The letters written by plaintiff, standing alone, certainly indicate that he left defendant's employ without objection. If the testimony of defendant is true — and no reason is perceived why the jury could not reasonably have so concluded — then the termination of the employment was by consent of both parties. Taking all the evidence together there is no room for reasonable controversy but that the question of whether there is credible evidence to support the findings of the jury must be answered in the affirmative. That requires an affirmance of the judgment appealed from.

By the Court.— The judgment is affirmed.

BOUTIN and others, Respondents, vs. ETSELL, Appellant.

April 9 — April 30, 1901.

Appeal: Pleading: Action, at law or in equity? Sureties: Contribution: Attorney's fees: Evidence: Insolvency of principal: Practice: Assignment of judgment.

1. Where a complaint states a plain cause of action at law, and was so treated by the parties on the trial, it will be so considered on appeal.
2. Where there were eleven sureties on the bond of a defaulting treasurer, and four of them effected a compromise of a judgment on the bond against all, and settled with the county by paying a less sum than the face of the judgment, they can compel a co-surety who is solvent and within this state to contribute his proportionate share of the amount paid in settlement, although the paying sureties had paid no more than their proportionate share of the original judgment.
3. The recovery in such case may include the proportionate part of reasonable attorney's fees and expenses, prudently incurred by the plaintiffs for the common benefit of all the sureties. *Shepard v. Pebbles*, 38 Wis. 374, distinguished and limited.
4. The finding of a jury will be sustained where there is at least some evidence to support the conclusion reached, and counsel do not deem the point of sufficient importance to point out its weakness.
5. In an action at law by sureties to compel contribution by a co-surety, no evidence nor finding as to the insolvency of the principal is necessary. Such fact need neither be averred nor proved.
6. The fact that the sureties on a defaulting county treasurer's bond settled with the county, and took an assignment instead of a satisfaction of the judgment, does not prejudice a co-surety sued for contribution, there being no attempt to recover the face of the judgment, but only such sum as the plaintiffs paid to settle the claim.
7. Where sureties who have paid the judgment and the judgment creditor so agree, the judgment may be kept alive by assignment to the paying sureties, and a co-surety compelled to contribute his proportionate share of the amount actually paid.

APPEAL from judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

One Alonzo Knight was elected county treasurer of Bayfield county for the term commencing January, 1899. He executed a bond, with the plaintiffs, defendant, and others as sureties, to the county, and entered upon the discharge of his duties. During his term, Knight became a defaulter, and thereafter an action was commenced on his bond against his sureties. Service was made on seven of the sureties, including the plaintiffs herein. Four, including the defendant, were not found, and did not appear. The others interposed a defense in good faith, and employed counsel. Judgment was docketed against them February 1, 1897, for $6,673.62. Afterwards the plaintiffs in this action secured a compromise with the county, and paid $2,000 and took an assignment of the judgment. They also paid over $388.50 for counsel fees and expenses in defending the action and securing the compromise. They bring this action against the defendant to compel him to pay one fifth of the amount so paid by them upon the compromise, and for counsel fees and expenses, claiming that the other sureties are either without the state or insolvent. The foregoing facts appear in the complaint. For answer, the defendant admitted the execution of the bond, the commencement of suit, the judgment and compromise as stated, and denied the other allegations. He also set up that two of the sureties, Nourse and McCamis, were dead, and had personal representatives within Bayfield county. The case was tried by the court with a jury. After the evidence was in, the parties stipulated that the only question that would be submitted to the jury was as to the alleged insolvency of the sureties, and of the estates of those shown to be dead; the other questions to be determined by the court. By a special verdict, the jury found the issue of insolvency as claimed by plaintiffs. The court made findings for plaintiffs, and directed judgment for plaintiffs for $477.70, and interest from December

10, 1897. From this judgment the defendant takes this appeal.

J. J. Miles, for the appellant.

For the respondents there was a brief by *Sanborn, Gleason & Sleight*, and oral argument by *E. F. Gleason.*

BARDEEN, J. A number of objections to the validity of the judgment are raised by defendant, which will be considered as presented:

1. He first raises the question whether this is an action at law or in equity. The complaint states a plain cause of action at law. It was so treated by the parties on the trial, and will so be considered here.

2. Next it is claimed that there were eleven sureties, and the facts show that plaintiffs have not paid more than their proportionate share of the original judgment. This contention ignores the fact of the compromise. The ultimate liability of all the sureties to the county was fixed at $2,000, which was paid by the four plaintiffs. The compromise was one which resulted to the benefit of all the sureties, and, for the purposes of this action, must be considered as the basis of individual liability. The liability of a surety to contribute to one who has paid more than his share of the common debt is one that is now recognized and enforced both at law and in equity. It rests upon equitable grounds, and appeals to the conscience of the judge and the chancellor alike. The time was that the paying surety in an action could only recover from his co-surety an aliquot part of the whole debt; regard being had to the number of sureties, and without regard to the insolvency or nonresidence of any of them. The considerations before mentioned induced a modification of this rule, so that it may be said to be established law in this state, as well as others, that, when one surety has paid the whole debt, he may compel contribution from such of his co-sureties as are solvent and within the state. *Smith v.*

Mason, 44 Neb. 610; *Stallworth v. Preslar*, 34 Ala. 505; *Werborn's Adm'r v. Kahn*, 93 Ala. 201; *Faurot v. Gates*, 86 Wis. 569; *Hardell v. Carroll*, 90 Wis. 350.

3. Another objection is that no recovery should have been allowed for attorney's fees paid in defense of the suit and securing a compromise. There is no claim that such fees are unreasonable, or that they were imprudently incurred, or that they were not incurred for the common benefit. On the contrary, it sufficiently appears that the plaintiffs acted as prudent men would have acted under the circumstances, and that such action resulted in a substantial benefit to all of the sureties. The following authorities justify the allowance of such fees and expenses: *Backus v. Coyne*, 45 Mich. 584; *Marsh v. Harrington*, 18 Vt. 150; *Fletcher v. Jackson*, 23 Vt. 581; *Gross v. Davis*, 87 Tenn. 226; 4 Am. & Eng. Ency. of Law, 3, and note; 1 Brandt, Suretyship & G. § 283. We are referred to the case of *Shepard v. Pebbles*, 38 Wis. 374, as sustaining the defendant's contention. It was a case for contribution, and the writer of the opinion makes use of the following language:

"But we do not understand that the right to contribution extended to the costs incurred by the plaintiff, or paid by him, in the action brought in the circuit court. It does not appear that the defendant authorized the payment of those costs, or agreed in any way to be liable for his share of them, and there is no special count in the complaint which would warrant any evidence to show that he was responsible for them."

There are, no doubt, cases when the expense incurred by a surety should not be allowed, and possibly the situation was such in the case referred to as to justify that conclusion. An inspection of the case and briefs on file, and of the facts stated in the opinion, fails to disclose the exact ground of the decision, any further than is disclosed by the language used. If the decision is made to rest upon the fact that no foundation for the recovery was laid in the complaint, there

is seeming justification for it. Otherwise, it would seem to stand upon dubious ground. Since the decision in *Faurot v. Gates, supra*, there is no good reason for saying that, in actions of this kind, reasonable attorney's fees, prudently incurred for the common benefit of the sureties, may not be recovered.

4. Another objection, somewhat feebly suggested, is that the evidence does not sustain the jury's finding as to the insolvency of the estates of several of the deceased sureties. The evidence is not referred to or discussed by counsel. There is at least some evidence in the record to support the conclusion reached, and, counsel not deeming the point of sufficient importance to point out its weakness, we shall hold it sufficient.

5. The last objection urged is that there was no evidence that Alonzo Knight, the principal on the bond, was insolvent. A complete answer to this position is that, this being an action at law, no such evidence or finding was necessary. Thus, it is said in 1 Brandt, Suretyship & G. § 290: "In an action at law by a surety against his co-surety for contribution, the weight of authority seems to be that the insolvency of the principal need not be averred or proved." See, also, to the same effect, *Smith v. Mason*, 44 Neb. 610; *Goodall v. Wentworth*, 20 Me. 322; *Rankin v. Collins*, 50 Ind. 158; *Sloo v. Pool*, 15 Ill. 47. The fact that the plaintiffs took an assignment instead of a satisfaction of the judgment does not prejudice the defendant. They are not seeking to enforce the face of the judgment, but only such sum as they paid to settle the claim. Secs. 3021–3024, Stats. 1898, recognize the right of the sureties to keep the judgment alive, and we see no reason why it may not be done by assignment, if the parties so agree. See *German Am. S. Bank v. Fritz*, 68 Wis. 390.

By the Court.—The judgment is affirmed.

DUFUR, Appellant, vs. PAULSON and another, imp., Respondents.

April 9 — April 30, 1901.

Logs and timber: Liens: Assignment: Payment: Partnership: Practice: Judgment: Appeal: Case: Briefs: Costs.

1. The mere fact that one is a partner in a firm owning a part of logs driven under a "pooling" arrangement between the owners thereof, does not prevent him from purchasing lienable claims in his own behalf, and enforcing them against the logs driven, and such purchase does not constitute payment nor extinguish the liens.
2. Where part of the defendants were in default, a general judgment dismissing the complaint will be reversed on appeal, as no judgment could properly be rendered in favor of such defaulting defendants.
3. A "case" which contains neither pleadings, verdict, charge, exceptions, nor evidence, except selections from the testimony of certain witnesses printed either as partisan statements or incomplete and misleading quotations, does not comply with Supreme Court Rule VIII, requiring so much of the record to be printed as shall be necessary to a full understanding of the question presented for review; and no costs can be taxed for printing it.
4. Under Supreme Court Rule XXVII no costs will be allowed for printing a brief containing language disrespectful to the trial court.

APPEAL from a judgment of the circuit court for Ashland county: FRANK M. FISH, Judge. *Reversed.*

It appeared that in the spring of 1898 logs of various owners became mingled in the White river waters; that such logs belonged partly to the firm of Younker & Co., claimed by the plaintiff to consist of John Younker and C. Dufur, mother of the plaintiff, marked "W. B."; other logs to the firm of Peterson & Paulson, marked "K. M." and "B. E. P."; other logs belonging to John F. Johnson, marked "Baby Foot"; other logs of Wilkinson & Co., marked "A. M."; that, after such commingling, all of the above-named owners entered into an agreement on June 9, 1898, called a "pool-

ing" arrangement, whereby they authorized J. H. Younker and one Charles Crogster to manage the drive for all of them, they agreeing to contribute proportionately to their quantity of logs. Crogster shortly dropped out, and Younker superintended the drive, and to that end employed one Belknap, who issued time checks, of which forty-nine aggregating $797.09, claimed to have been purchased by the plaintiff in his personal capacity, are the subject of this suit. Plaintiff filed a petition for lien to enforce the whole of said time checks against only two of the four ownerships of logs, namely, the Peterson & Paulson and the John F. Johnson. He afterwards commenced this suit to enforce such lien, stating a separate cause of action upon each of said forty-nine time checks, and joining as defendants a firm of Fossen & Co., who, by contract, were under obligation to drive the Peterson & Paulson logs.

All of the defendants except *Peterson* and *Paulson* suffered default. They interposed answer, wherein they first set up a plea in abatement, alleging that the plaintiff, *Dufur*, was a copartner with John H. Younker at the times mentioned in the complaint, "and that said plaintiff was such copartner and jointly interested with the said J. H. Younker in the ownership of the logs marked 'W. B.,' which were a part of the logs upon which the work described in the complaint herein was performed, for which work the time checks described in the complaint were issued; and that said J. H. Younker is a necessary party to this action." The answer further proceeds with defensive matter, charging that other parties than the defendants were liable and their logs responsible proportionately for these time checks, alleging that the defendants Peterson & Paulson had fully paid their share for the driving, and alleging that *Dufur*, instead of buying said time checks, had taken up and paid them on behalf of the said copartnership of Younker and *Dufur*, and that they were extinguished; also setting up as counterclaim

an alleged indebtedness of Younker & Co. to them. Said defendants also tendered $75 in full of any liability by them upon the cause of action set out in the complaint, and subsequently deposited the $75 in court, where it was at the time of rendition of judgment.

Upon the trial, evidence was given upon the various issues, and at the close of the evidence both parties moved for a direction of verdict. There was argued the question of law as to the right of the plaintiff to buy in time checks, and discriminate among the several parties liable therefor by releasing the logs of some and attempting to enforce the whole against the logs of only a part; whereupon the court announced that he would take a special verdict on the plea in abatement anyhow, inquired of counsel if there was any other issue of fact they would like to have submitted, and thereupon submitted to the jury the following question by way of special verdict: "Was the plaintiff, *John F. Dufur*, a partner in the firm of John H. Younker & Co. at the dates and times mentioned in the complaint?" which was answered in the affirmative. The court charged the jury, to which charge some exceptions were taken by the plaintiff; but neither the charge nor the exceptions are embodied or identified in the bill of exceptions. Thereupon motions for judgment notwithstanding the verdict and for new trial were overruled, and judgment dismissing the complaint was entered, apparently upon the plea in abatement, from which judgment the plaintiff appeals.

John F. Dufur, appellant, in person.

For the respondents there was a brief by *Sanborn, Gleason & Sleight*, and oral argument by *Richard Sleight.*

DODGE, J. The trial below seems wholly inconclusive upon any of the issues joined. Upon the merits no determination either by court or jury seems to have been made as to any issue of fact. Upon the plea in abatement a question was

answered by the jury, but that question and answer have no relevancy to the maintenance of that plea. Plaintiff may have been a partner with Younker at all of the times mentioned in the complaint, as the jury finds, and yet have perfect right to maintain this action for part, at least, of the relief sought. Such partnership would not render it impossible for him to purchase and take assignment of these time checks, and to enforce liens therefor upon the logs driven. No objection could be made unless by his partner, to whom he might owe some fiduciary duty. If the claims became plaintiff's individual property, he might sue thereon alone, and the plea in abatement could not be sustained. On this, the only material question,— whether plaintiff bought the time checks individually or on behalf of the firm,— no decision was made below.

While the verdict was taken expressly with relation only to the plea in abatement, the question of partnership had some relevancy to the issue of payment. Indeed, plaintiff's counsel distinctly conceded that, if plaintiff was a partner with Younker, no recovery could be had, because his purchase would then constitute a payment of the time checks, and would extinguish the liens securing them. We need not consider whether even the firm owning part of these pool logs might not so purchase lienable claims against them as to keep alive the lien right, for, as already stated, an individual partner certainly might. We cannot, therefore, agree with the concession of plaintiff's counsel, and hold the mere existence of partnership conclusive against plaintiff's recovery. If he purchased the time checks individually, it would not constitute payment nor extinguish the lien. Hence, even if we apply the verdict to the defenses offered in bar, it is alike inconclusive as upon the plea in abatement. It is not contended, and could not be successfully, that the judgment is supported by uncontradicted evidence, and it must be reversed, since it cannot find support in the verdict.

Another very obvious ground for reversal of this general judgment dismissing the complaint is that all of the defendants other than *Peterson* and *Paulson* were in default, in effect conceding plaintiff's right to recover. Certainly, no judgment could properly have been rendered in their favor.

While, apparently, it was not considered upon the trial that any issues of fact needed to be passed on by the jury other than the plea in abatement, we cannot feel justified in attempting to direct a judgment here, even if we should conclude, as appellant asserts, that no evidence supports the assertion of partnership. The proceedings upon the trial, as brought before us even by the bill of exceptions, are involved in too much of confusion and uncertainty to warrant such a step. *Brown v. Griswold*, 109 Wis. 275. In addition to this, the appellant has neglected to print in the case even that which the record does disclose.

2. The appellant alleges twelve assignments of error, including refusal to direct verdict, refusal to enter judgment notwithstanding verdict, refusal to direct with reference to a tender deposited in court, giving of erroneous instructions, and others; thus necessitating for their consideration a complete examination of the entire record, including the evidence. The record contains about 150 pages, the printed case but nineteen. It contains neither pleadings, verdict, charge, exceptions, nor evidence, except about eight pages of disconnected selections from the testimony of certain witnesses. On no single subject discussed by counsel has it been possible to pass without going to the record itself. Worse than this, the matter which is printed is either partisan statement or incomplete and misleading quotation. The printed case fails wholly to comply, either in letter or spirit, with Rule VIII, and no costs can be taxed therefor.

A still more serious infraction of our rules and of profes-

sional propriety forces our attention. In appellant's brief we find the following:

"Ninth. The court erred in his charge to the jury. The charge indicated clearly the feeling of the court. The court said to the jury: 'The question for you to determine is whether or not at those times *John F. Dufur* was the "partner in interest" with John H. Younker in the firm of J. H. Younker & Co.' This is absurd, nonsensical, ridiculous, and prejudicial."

Under no circumstances can such language with reference to a trial court be either justified or excused,— certainly not when used with the deliberation attendant upon the preparation of a printed brief for this court. The instance before us is especially inexcusable in that the appellant, who uses it, has not brought up for review the charge of the court thus characterized. The bill of exceptions does not contain it either in words or by identification, by which means only can we receive authentic information of its contents. The disrespectful epithets are therefore gratuitous, and without even self-interest as palliation. Appellant must at least suffer the penalty of loss of costs for printing in such cases denounced by Rule XXVII.

By the Court.— Judgment reversed, and cause remanded for further proceedings according to law. No costs will be allowed for printing case or brief.

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110 286 j113 1405 SOMO LUMBER COMPANY, Respondent, vs. LINCOLN COUNTY and another, Appellants.

April 9 — April 30, 1901.

Municipal corporations: General city charter law: Cities under special charters: What cities may reorganize under general law: Taxation: Statutes: Constitutional law.

1. The general city charter law (ch. 326, Laws of 1889) provided that any city "*now incorporated*" under the laws of this state might adopt said act in the manner therein prescribed, but made no

provision for its adoption by a city thereafter incorporated under a special charter. Sec. 72, ch. 312, Laws of 1893, amendatory thereof, provided that any city, "*now organized*" under a special charter, might, by ordinance, adopt the provisions of any special chapter, section, or subdivision of a section of that act, in addition to, or in lieu of, the provision of its special charter, and that when so adopted such ordinance should operate to that extent as an amendment of such special charter, but that no city should be deemed to have surrendered its special charter and become organized under such act until it should have adopted all its provisions in full. *Held*, that a city organized in 1891 under a special charter had the power to adopt the general city charter law in 1896, and that after it had taken such action taxes levied in excess of the amount authorized by said law were invalid.

2. The provision of the general city charter law (sec. 925—142*a*, Stats. 1898) limiting the amount which cities operating thereunder may raise by taxation in any one year is not void for uncertainty.

3. The restriction on taxation contained in said sec. 925—142*a*, Stats. 1898, must be deemed to have been made pursuant to the mandate of sec. 3, art. XI, Const., empowering the legislature, and charging it with the duty, to provide for the organization of cities and incorporated villages and to restrict their power of taxation so as to prevent abuses in assessments and taxation.

[4. Whether such provision is invalid in so far as it restricts the power of a city to levy taxes in excess of three per cent. to pay debts contracted prior to its adoption of the general charter law, not decided.]

[5. Whether the question as to the violation of such restriction can be raised by a taxpayer, or whether it can only be properly raised by a bondholder, not decided.]

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the briefs of *Curtis, Reid, Smith & Curtis*, and for the respondent on that of *John Barnes.*

Appellants contended, *inter alia*, that the city of Tomahawk had no power to adopt the general city charter law, and consequently was not subject to the limitation therein contained on the power of taxation. 16 Am. & Eng. Ency. of Law, 920; 19 id. 394; *Clark v. Lord*, 20 Kan. 396; *Pike*

v. Kennedy, 15 Oreg. 420; *Welch v. Wilcox*, 101 Mass. 162; *Quinn v. Hardenbrook*, 54 N. Y. 83; *Howard v. Mansfield*, 30 Wis. 75; *Att'y Gen. v. Eau Claire*, 37 Wis. 400; *Kuhl v. C. & N. W. R. Co.* 101 Wis. 48; *Wentworth v. Racine Co.* 99 Wis. 30; Cooley, Const. Lim. (5th ed.), 139, 240, 253, 255; *Slinger v. Henneman*, 38 Wis. 509, 510; *Ryan v. Outagamie Co.* 80 Wis. 337; Tiedeman, Mun. Corp. § 88; *Laver v. McGlachlin*, 28 Wis. 364; *Baker v. State*, 69 Wis. 32, 37; *In re Burke*, 76 Wis. 357; *Quint v. Merrill*, 105 Wis. 407; *Herman v. Oconto*, 100 Wis. 392. The limitation in sec. 925—142*a*, Stats. 1898, is void for uncertainty and is also unconstitutional. *Oconto W. S. Co. v. Oconto*, 105 Wis. 86; *U. S. v. New Orleans*, 98 U. S. 381; sec. 9, art. I, and sec. 1, art. XIV, Const.; *Anderton v. Milwaukee*, 82 Wis. 279, 284; *Durkee v. Janesville*, 28 Wis. 464; *Hincks v. Milwaukee*, 46 Wis. 559; *Janesville v. Carpenter*, 77 Wis. 303; *Wilder v. C. & W. M. R. Co.* 70 Mich. 382; 23 Am. & Eng. Ency. of Law, 228; *State v. Partlow*, 49 Am. Rep. 652; *Chaffee's Appeal*, 56 Mich. 244; *In re Hendricks*, 60 Kan. 796. Assuming that the city of Tomahawk was subject to the limitation in sec. 925—142*a*, Stats. 1898, and that the same was a valid limitation, nevertheless it had power to levy taxes in excess of that limitation to pay debts incurred prior to the adoption of the general charter by the city. Cooley, Const. Lim. (5th ed.), 356; 25 Am. & Eng. Ency. of Law, 586; *State ex rel. Hasbrouck v. Milwaukee*, 25 Wis. 122; *Brodie v. McCabe*, 33 Ark. 690; *Second Ward S. Bank v. Schranck*, 97 Wis. 250; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488; *Eau Claire Nat. Bank v. Macauley*, 101 Wis. 304; *Van Hoffman v. Quincy*, 4 Wall. 535; *Murray v. Charleston*, 96 U. S. 432; *Louisiana v. New Orleans*, 102 U. S. 203; *Wolff v. New Orleans*, 103 U. S. 358; *Gunn v. Barry*, 15 Wall. 610; *Edwards v. Kearzey*, 96 U. S. 595; *Shapleigh v. San Angelo*, 167 U. S. 646; *Heath & M. Mfg. Co. v. Union O. & P. Co.* 83 Fed. Rep. 776.

CASSODAY, C. J. This action was commenced April 27, 1898, to set aside the taxes of 1897 on the plaintiff's real estate, described — situated in the city of Tomahawk — and to restrain the collection thereof. Issue being joined and trial had, the court found as matters of fact, in effect, that the city of Tomahawk was organized under ch. 58, Laws of 1891; that in February, 1896, the common council of the city adopted an ordinance purporting to ordain that ch. 326, Laws of 1889, as amended by ch. 312, Laws of 1893, be adopted in lieu of its special charter; that in February, 1896, the governor issued to the city letters patent under the great seal of the state, reciting the facts, defining the boundaries of the city, and purporting to constitute the same a municipal corporation governed by the provisions of the general charter law then in force and now incorporated in ch. 40*a*, Stats. 1898; that from and after such adoption the people and officers of the city acted pursuant to the general charter law; that the plaintiff's property, described, was subject to assessment, and was assessed in the city for that year; that the assessor and board of review exercised reasonable diligence, and did not intentionally discriminate against any taxpayer, nor intentionally omit from assessment any known taxable property in making up the assessment roll for that year; that the total assessed valuation of the property in the city was $373,674; that there was levied thereon a tax of five per cent., aggregating $18,683.70, of which amount $1,980 was levied to pay waterworks bonds of the city, and interest on the same, $2,328 to pay railroad bonds of the city, and interest thereon, $7,473.48 for the support of city schools, $5,460.43 for state and county taxes, and $1,441.79 for general city purposes; that the two items to pay bonds and interest, aggregating $4,308, were levied to pay legal indebtedness of the city created and existing prior to April 1, 1896; that the plaintiff had not paid or tendered the taxes, or any part thereof, levied against its

property. And as conclusions of law the court found, in effect, that the assessment was valid; that in February, 1896, the city had power to adopt, and did legally adopt, as its charter the general city charter of this state included in ch. 326, Laws of 1889, and subsequent amendments; that the limitation on the power of taxation contained in the general charter law now embodied in sec. 925—142*a*, Stats. 1898, is a valid limitation, and the same was in effect in the city of Tomahawk in the year 1897, and prevented the levy in the city for all purposes of any greater tax than three per cent. of the assessed valuation of the city; that all taxes carried out against the plaintiff's property in excess of three per cent. of the assessed valuation thereof were levied without authority in law; that the balance of the taxes against the plaintiff's property are valid and legally chargeable to the same; that the amount legally chargeable was $390, together with the usual five per cent. collector's fees, and interest on the total amount at six per cent. per annum from January 1, 1898; that the plaintiff was entitled to judgment setting aside the taxes of 1897 upon its property, and restraining the collection thereof, etc., on condition that it pay into the court, for the use and benefit of the defendant *Lincoln County* within thirty days from the filing of the findings, the sum of $390, with five per cent. collector's fees, and interest on the combined sum at the rate of six per cent. per annum from January 1, 1898; that on failure of the plaintiff to pay such sum as required the defendants will be entitled to judgment dismissing the complaint. From the judgment entered thereon accordingly the defendants bring this appeal.

1. The important question in this case is whether the trial court was right in holding that the city of Tomahawk had power to adopt the general charter law in February, 1896. The original general charter law is ch. 326, Laws of 1889. By the first section of that act the cities of this

state *then existing* or that might thereafter be created under the provisions of *that act* were divided into three classes, as therein stated. The second and third sections of the act read as follows:

"No city *now incorporated* under the laws of this state shall be affected by the provisions of this act, unless such city shall adopt the same for its government in the manner hereinafter provided." "When the common council of any city *now incorporated*, by a three-fourths vote of all the members thereof shall have adopted this act for its government, and a patent shall have been issued as hereinafter provided, such city shall cease to exist as a corporation under the charter and laws creating such corporation or adopted for its government, and shall constitute a municipal corporation under this act, and shall be governed by its provisions."

Then, after prescribing the manner of such adoption, it is provided therein that:

"Whenever this act shall be adopted by a city *now incorporated*, the officers of such city shall continue in office . . . until their successors are elected and qualified." Sec. 6.

Then, after prescribing the manner of incorporation of cities under such general charter act, it provides for the issuance of a patent therefor, and, among other things, declares that:

"Any patent issued and recorded in the manner herein provided, the record thereof or a certified copy of such record, shall be conclusive evidence in all courts and places of the due incorporation of the city mentioned in said patent, and of all the facts therein recited." Sec. 13.

That act went into effect April 12, 1889. There is no question but that the provisions of the act mentioned gave ample authority to any city then existing under a special charter to adopt such general charter, but it obviously gave no such authority to any city which might thereafter be incorporated and organized under a special charter. This, no doubt, was owing to the fact that the same legislature which passed such general charter law also proposed the constitu-

tional amendment, prohibiting the legislature "from enacting any special or private laws . . . for incorporating any city, . . . or to amend the charter thereof." Subd. 9, sec. 31, art. IV, Const.; Laws of 1889, p. 764. With such pending amendment and the existence of such general charter law, it was obviously supposed that no subsequent legislature would incorporate any city by a special charter. Nevertheless, the next legislature did incorporate the city of Tomahawk by special charter. Ch. 58, Laws of 1891. At the same session of the legislature several other cities were incorporated by special charters, and the special charters of numerous cities then existing were in that year amended, and yet the same legislature agreed to such proposed amendment to the constitution. Laws of 1891, pp. 731, 732. Such proposed amendment was ratified by the electors of the state in November, 1892. The question recurs whether any statute was subsequently enacted which authorized such cities so incorporated by special charters in 1891 to adopt the general charter law. That law was amended in many important provisions by ch. 312, Laws of 1893. The first section of this last-named act amended the first section of the general charter law so that the cities of the state *then existing* or that might be created under the provisions of that act should be divided into four classes as therein stated. But that act did not expressly undertake to amend the provisions of secs. 2 and 3 of ch. 326, Laws of 1889, above quoted; nor did it expressly authorize the cities incorporated by special charters in 1891 to adopt such general charter law. A new provision in that act, relating to the payment of the proportionate share of the joint indebtedness of a town and a city situated therein, is made applicable to any city then incorporated under a special charter, and so jointly indebted. Sec. 1*a*, ch. 312, Laws of 1893. The act also amended sec. 13, ch. 326, Laws of 1889, but continues the provision of that section quoted above. Sec. 6, ch. 312, Laws

of 1893. Sec. 267, ch. 326, Laws of 1889, authorized all cities then "existing under any special law" to "exercise all the powers contained" in that "act relating to the issuing of improvement bonds to pay for special assessments." By sec. 72, ch. 312, Laws of 1893, that section was amended so as to declare, among other things, that:

"Any city now organized under a special charter, may adopt the provisions of any special chapter, section or subdivision of any section of this act, and may exercise any power or franchise hereby conferred upon cities organized under this act, in addition to, or in lieu of, the provisions of its special charter and the powers and franchises therein specified by an ordinance adopted for that purpose by a three-fourths vote of all the members of the common council elect, and when adopted as herein prescribed, such ordinance shall operate to that extent as an amendment of such special charter. . . . No city, however, shall be deemed to have surrendered its special charter and organized under this act until it shall have adopted all of its provisions in full, as hereinbefore provided."

Thus the city of Tomahawk, as well as any other city created by special charter in 1891, was, by that amendment, expressly authorized to adopt "any special chapter, section or subdivision of any section" of that act, and to "exercise any power or franchise" thereby conferred upon cities organized thereunder. Unless such express authority to so adopt any portion of the general charter law was regarded broad enough to empower any city then organized under a special charter to adopt the entire general charter law, there was no necessity for declaring therein that no such city should "be deemed to have surrendered its special charter" until it should have "adopted all" the provisions of the general charter law. The implication may fairly be indulged that, in case such city should adopt all the provisions of the general charter law, then it should thereby "be deemed to have surrendered its special charter." Since such city was expressly authorized to adopt chapter after chapter until

the whole should be included, there would seem to be no want of power to adopt the whole in the first instance. A grant of power clearly implied is just as effective as a grant of power expressly declared. Any other construction would defeat the object of the general charter law as to all cities incorporated by special charters in 1891. The general purpose of the enactment is to be considered in construing its provisions. Thus it has been held by the highest court in England that: "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity, or the absolute intractability of the language used." *Salmon v. Duncombe*, 11 App. Cas. 627. "Even penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature." *Manitowoc Co. v. Truman*, 91 Wis. 12. In the language of the late Justice FIELD:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter." *U. S. v. Kirby*, 7 Wall. 486, 487.

We must hold that the city had the power to adopt the general charter law in 1896, and did so.

2. It follows that ch. 199 of the Laws of 1895, amending the general charter law, as the same was amended by sec. 3, ch. 138, Laws of 1897, and now found in sec. 925—142*a* of the Statutes of 1898, was applicable to the city of Tomahawk in 1897, when the taxes in question were levied. In that statute it is provided that:

"A tax levied for any one year for municipal purposes, together with the tax required to be levied for state, county, county school and school district purposes, and for delinquent taxes for the preceding year, shall not exceed the amount of three per cent. of the assessed value of real and personal property of the city in that year."

The later amendment increasing such per cent. is not here involved. Ch. 262, Laws of 1899.

Counsel for the defendants contend that sec. 925—142*a* is unconstitutional, and also void for uncertainty. We perceive no uncertainty in the language employed. The constitution of this state expressly gave to the legislature power, and charged it with the duty, "to provide for the organization of cities and incorporated villages, and to restrict their power of taxation so as to prevent abuses in assessments and taxation." Sec. 3, art. XI. Const. The restriction in question must be deemed to have been made pursuant to such mandate. Counsel contends that, assuming that the city was subject to such limitation, and that the same was valid, nevertheless it was inoperative, so far as it restricted the power of the city to levy taxes in excess of three per cent. to pay debts contracted prior to the adoption of the general charter law. It is enough to say that according to the findings, above set forth,— which are verities in the case,— the aggregate amount of the state tax, and the county tax, and waterworks bonds and interest, and railroad bonds and interest is considerably less than the three per cent. authorized, and hence the question suggested is not involved in the case. Whether a taxpayer, as here, can properly raise such question, or whether it can only be properly raised by the bondholder, as argued by counsel, may be an important question; but, as it is not here involved, we decline to consider it.

By the Court.— The judgment of the circuit court is affirmed.

McIntosh, Respondent, vs. Marathon Land Company, Appellant.

April 9—April 30, 1901.

Foreign wills: Authentication: Authority of executor to convey land: Construction of statutes: Evidence: Deeds: Record copy: Interlineations: Tax deeds: Payment of tax: Treasurer's books as evidence: Redemption from tax.

1. Sec. 2295, Stats. 1898 (providing that, when a will devising lands in Wisconsin has been duly probated in any other state or territory, a duly authenticated copy of such will may be recorded in the office of the register of deeds of any county in which such lands are situated, and shall then have the same effect to pass title to such lands as if probated in Wisconsin, and that the record of such copy shall be presumptive evidence of the authority of any person authorized by such will to convey or dispose of such lands), and sec. 3267 (providing that, upon the filing of an authenticated copy of the original appointment of a foreign executor or administrator in the proper county court, he may exercise any power over the estate, including sales or assignments of the same, which an executor or administrator duly appointed by the proper court of Wisconsin can exercise), are independent sections, intended to cover different situations, sec. 2295 covering cases where, by the terms of the will, lands are devised or authority given to convey, and sec. 3267 cases where the executor or administrator must obtain judicial authority to sell or convey.
2. If the papers attached to the copy of a will, which devised the real property of the testator wherever situate to S. W., appointed her executrix, and authorized her to sell said real estate, show that the will was duly admitted to probate in another state, and are properly authenticated, the copy becomes entitled to record in the office of the proper register of deeds in this state under sec. 2295, and when so recorded becomes presumptive evidence of the authority of S. W. to convey the lands of the testator in this state.
3. A duly authenticated copy of a will probated in Pennsylvania did not show any formal order or judgment admitting the will to probate. A decision of the supreme court of Pennsylvania, introduced in evidence, and the testimony of a member of the Pennsylvania bar, showed that a formal order or decree of probate is not usual in

that state, and that the papers offered in evidence would be admitted in any court of Pennsylvania as proving that the will in question was properly proven and admitted to probate. *Held* that, under sec. 1, art. IV, Const. of U. S. (providing that full faith and credit shall be given in each state to the public records and judicial proceedings of every other state), the copy of the will was admissible in evidence in the courts of Wisconsin.

4. In an action to quiet title plaintiff introduced in evidence, as proof of his title to lands in section 17, the record of a deed which described the property as section 19, with a small "7" written over the "9," the original deed not being produced. The "9" was not obliterated nor was there a partial erasure, and there was no deed or other paper in evidence, signed by the grantor in the deed in question, which tended to show that section 17 was intended. *Held*, not sufficient to prove plaintiff's title to land in section 17.

5. It being the duty of the town treasurer under sec. 1095, Stats. 1898, to note the payment of the taxes upon the tax roll, if paid to him, and the tax roll itself being made presumptive evidence of the facts stated in it under sec. 4162, a tax roll produced and identified by the county clerk, on which appeared opposite the description of the land on which a tax deed had issued, under the column headed "Remarks," the entry "Paid April 15, '64," is sufficient and competent evidence to prove the payment of the tax, and sufficient to defeat the tax deed issued thereon.

6. Under sec. 1095, Stats. 1898, it is the duty of the town treasurer to make a duplicate stub receipt whenever he receives payment of any taxes, and by sec. 1096 he is required to compare the stub receipt book with the tax roll, and return it with the tax roll to the county treasurer. Sec. 1096 further provides that such stub receipt book shall have the same effect, as evidence, as the original receipt. *Held*, that a stub receipt book, properly produced and identified, which showed payment of taxes for which a tax deed had been issued, is competent and sufficient evidence of the payment of the tax and the invalidity of such tax deed. *Pier v. Prouty*, 67 Wis. 218, distinguished.

7. Where lands were sold for taxes in 1864, and tax deeds issued thereon recorded March 1, 1869, entries in the county clerk's sales book of 1864, opposite the descriptions of such lands, to the effect that they were redeemed June 14, 1869, are incompetent evidence to prove the redemption of such lands from such tax, since they purported to have been made at a time when no officer was empowered to receive redemption money and when no redemption could be made.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Affirmed in part; reversed in part.*

This is an action brought under sec. 3186, Stats. 1898, to quiet the title to several hundred acres of unoccupied land in Marathon county, Wisconsin. The complaint alleges the plaintiff's title to said lands, and that the defendant obtained and recorded a tax deed thereof in 1897, which is alleged to be void on account of errors and irregularities in the tax proceedings, and demands judgment vacating and canceling such deed. The answer denies the plaintiff's title, and alleges the validity of its tax deed. Upon the trial the plaintiff offered record evidence tending to show a chain of title to all of the lands from the United States to himself, as well as evidence showing fatal defects in the defendant's tax deed. The invalidity of the tax deed was not, and is not now, contested, but defendant claimed that the proof did not show that the plaintiff had title to the lands.

In the plaintiff's chain of title it appeared that the title to all of the lands was at one time in one Henry Walton. In order to prove the transfer of the title from Walton to plaintiff's grantor, the plaintiff offered in evidence the record of a deed from one Sophia Walton as executrix of the will of Henry Walton, deceased, executed March 24, 1887, reciting the death of Henry Walton September 15, 1886, and the subsequent probate of his will in Philadelphia, with certain provisions of said will purporting to transfer the title of said lands to Sophia Walton, with the power to convey the same. The plaintiff also offered in evidence a certified copy of the will of said Henry Walton, appearing to have been executed by the testator July 1, 1885, the provisions of which will it is not necessary to state, except to say that, after sundry bequests of personal property, the testator's real and personal estate is given to Sophia Walton, charged with certain duties, and she is given authority to make, execute, and deliver suf-

ficient deeds of said real estate, and is appointed executrix of said will. Attached to the alleged copy of the will were the following official certificates:

"City and County of Philadelphia — ss.:

"Register's Office, September 21st, 1886.

"Then personally appeared U. F. Muzzarelli and F. Y. Austin, the subscribing witnesses to the foregoing last will of Henry Walton, deceased, and on their solemn oath did say that they were present, and did see and hear Henry Walton, deceased, the testator therein named, sign, seal, publish, and declare the same as and for his last will and testament, and that at the doing thereof he was of sound disposing mind, memory, and understanding, to the best of their knowledge and belief.

"U. F. MUZZARELLI.
"F. Y. AUSTIN.

"Sworn and subscribed before me the above date.

"WM. G. SHIELDS,
"Deputy Register.

"City and County of Philadelphia — ss.:

"Register's Office, September 21st, 1886.

"I do swear that as the executrix of the foregoing last will and testament of Henry Walton, deceased, I will well and truly administer the goods and chattels, rights and credits, of said deceased according to law, and that I will diligently and faithfully regard and truly comply with the provisions of the law relating to collateral inheritance; that the said testator died on the 15th day of September, A. D. 1886, at 9:50 o'clock p. m.

"SOPHIA WALTON,
"138 West Chelton Ave.,
"Germantown, Pa.

"Sworn and subscribed before me the date above mentioned, and letters testamentary granted unto her.

"WM. G. SHIELDS,
"Deputy Register.

"Commonwealth of Pennsylvania, }
"City and County of Philadelphia, } ss.

"Register's Office, April 18th, 1898.

"I, Horatio B. Hackett, register of wills and *ex officio* clerk of the orphans' court for the city and county of Philadelphia, in the commonwealth of Pennsylvania, do hereby certify the foregoing to be a full and complete copy of the

last will and testament of Henry Walton, deceased, together with the probate thereof, upon which letters testamentary were granted unto Sophia Walton on the 21st day of September, A. D. 1886; that I have compared the foregoing copies with the original instruments of record in said office; and that the same are true copies thereof and transcripts therefrom, and from the whole thereof, as the same remains on file and of record in this office.

"In testimony whereof, I have hereunto set my hand and official seal at Philadelphia the date above.

"HORATIO B. HACKETT,
[Official seal.] "Register of Wills and Ex Officio Clerk
"of the Orphans' Court.

"State of Pennsylvania, }
"Philadelphia County, } ss.

"I, William B. Hanna, president judge of the orphans' court of Philadelphia county, do certify that the foregoing certificate and attestation made by Horatio B. Hackett, Esq., register of wills and *ex officio* clerk of said orphans' court, whose name is thereto subscribed, and seal of his office affixed, are in due form and made by the proper officer. In testimony whereof, I have hereunto set my hand this 18th day of April, in the year of our Lord one thousand eight hundred and ninety-eight (1898).

"WILLIAM B. HANNA,
"[L. S.] President Judge.

"State of Pennsylvania, }
"Philadelphia County, } ss.

"I, Horatio B. Hackett, Esq., register of wills and *ex officio* clerk of the orphans' court of Philadelphia county, do certify that the Honorable William B. Hanna, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, president judge of the orphans' court of Philadelphia county, duly commissioned and sworn, to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court this 18th day of April, in the year of our Lord one thousand eight hundred and ninety-eight (1898).

"HORATIO B. HACKETT,
[Official seal.] "Register of Wills and Ex Officio Clerk
"of the Orphans' Court."

The plaintiff also introduced the record of the same papers in the office of the register of deeds of Marathon county, showing that they were all duly recorded in said office December 6, 1898. Due objection was made by the defendant to all of this evidence, but it was all received.

As to one tract of the land in question (being the N. E. ¼ of the S. W. ¼ of section 17) one deed in the plaintiff's chain of title was specifically objected to because the record of the deed (the original not being produced) described the land conveyed as being in section 19; a small and faint figure "7" being written directly above the figure "9," but the figure "9" not being erased. This deed was objected to on the ground that it did not cover any land in section 17, but the deed was received in evidence.

The defendant, in order to show that the plaintiff had no title to a part of the lands claimed, offered in evidence the record of three tax deeds executed to Marathon county: one covering the S. W. ¼ of section 17, recorded March 23, 1868; one covering the N. ½ of the S. E. ¼ of section 5, recorded March 1, 1883; and one covering the N. W. ¼ of section 20, recorded March 23, 1868. In order to meet this evidence, the plaintiff offered certain documentary evidence tending to show that the taxes for which said last-named deeds were issued had been paid and redeemed, the nature of which evidence will appear from the opinion.

The court found the plaintiff's title good to all of the lands claimed and the defendant's tax deed void, and ordered judgment for the plaintiff on payment of the amount of taxes due on the defendant's tax deed, which amount was agreed upon and deposited in court. Upon this finding judgment for the plaintiff, removing the cloud and canceling the tax deed, was rendered, and the defendant appeals.

For the appellant there was a brief by *Brown, Pradt & Genrich*, and oral argument by *Neal Brown*.

For the respondent there was a brief by *Bump, Marchetti & Bump*, counsel, and oral argument by *E. L. Bump*.

WINSLOW, J. The defendant's contentions were three in number: first, that the alleged will of Henry Walton was not sufficiently certified to show that it had ever been probated, and that neither it nor the deed of the alleged executrix was admissible in evidence, nor sufficient, if admissible, to convey any title; second, that the record of the deed of the N. E. ¼ of the S. W. ¼ of section 19 was not admissible in evidence as a deed of any part of section 17, notwithstanding the appearance of the figure "7" immediately above the figure "9;" and, third, that the documentary evidence introduced as tending to show the payment or redemption of the taxes upon which the tax deeds to Marathon county were based was inadmissible, and does not prove such payment or redemption.

1. Doubtless the defendant is correct in its contention that the plaintiff cannot maintain an action to quiet title under sec. 3186, Stats. 1898, unless he proves that he has legal title to the land, or owns a valid lien or incumbrance thereon. This conclusion follows necessarily from the plain wording of the section, which only grants the right to bring the action to a person "having legal title to land," or "being the owner and holder of any lien or incumbrance on land." If, therefore, the probate of the alleged will of Henry Walton was not sufficiently proven by the papers offered in evidence, or if the deed from the executrix was not admissible, the plaintiff's proof of title failed, and he cannot recover. By sec. 2295, Stats. 1898, it is provided in substance that, when a will devising lands in this state has been duly probated in any other state or territory, a duly authenticated copy of such will may be recorded in the office of the register of deeds of any county in which such lands are situated, and shall then have the same effect to pass title to such

lands as if probated in this state, and that the record of such copy shall be presumptive evidence of the authority of any person authorized by such will to convey or dispose of such lands. In the case of *Wells, Fargo & Co. v. Walsh*, 88 Wis. 534, this section was construed, and it was held that, where its terms were complied with, the title to property devised in trust by the foreign will passed to the trustee. We are unable to see any defect in the logic of that case, nor do we perceive any reason for now reviewing it. It is claimed, however, that this section does not stand alone, but must be construed with sec. 3267, Stats. 1898, which provides that, upon the filing of an authenticated copy of the original appointment of a foreign executor or administrator in the county court, he may exercise any power over the estate, including sales or assignments of the same, which an executor or administrator duly appointed by the proper court of this state can exercise. It is entirely apparent that the two sections named are independent sections, intended to cover different situations. Sec. 2295 is intended to cover cases where, by the terms of the will, lands are devised, or authority given to convey, such as the case now before us, while sec. 3267 is intended to provide for cases where the executor or administrator must obtain judicial authority to sell or convey lands. The will in question here not only gave to Sophia Walton all the real property of the testator, wherever situate, but also appointed her as executrix, and authorized her to sell such real estate and execute and deliver deeds thereof in fee simple to the purchasers. The case therefore comes clearly within the provisions of sec. 2295, *supra;* and if the papers attached to the recorded copy show that it was duly admitted to probate by the proper court of Pennsylvania, and are duly authenticated, then it was entitled to be recorded in the register's office of Marathon county, and when so recorded must have the effect provided by the section named.

There is no contention made that the authentication is in any respect defective, but it is said that there is no order or judgment admitting the will to probate. It is true that there does not appear in the record any formal order admitting the will to probate, such as is usually made in the probate courts of this state; but it appears by a decision of the supreme court of Pennsylvania, which was introduced in evidence by the plaintiff (*Holliday v. Ward*, 19 Pa. St. 485), as well as by the testimony of a member of the Pennsylvania bar, that a formal decree of probate is not usual in that state, and that the papers here presented would be admitted in evidence in any court of Pennsylvania as proving that the will was properly proven and admitted to probate. Such being its effect in the courts of Pennsylvania, such must be its effect in the courts of Wisconsin, under sec. 1, art. IV, of the federal constitution. *Parker v. Stoughton M. Co.* 91 Wis. 174. It follows that the appellant's first contention cannot be sustained.

2. As to the second contention, however, we can arrive at no conclusion except that the plaintiff's title was not proven. This contention involved simply the title to one tract of forty acres of land in section 17. One of the deeds in the chain of title, and which was absolutely essential to the plaintiff's title, described the land conveyed or attempted to be conveyed as being in section "19." Respondent claims that this was evidently a mistake, and that section 17 was intended, principally because upon the record of the deed a small and faint figure "7" appears just above the "9." The "9," however, is not erased, nor in any way obliterated. It remains just as originally written. It seems probable that it was an error, but there is really nothing to show it. Had the "9" been partially erased or obliterated, and the "7" written over the erasure, it might, perhaps, be presumed that the recording officer had made a mistake in copying the deed into the record, and afterwards corrected it to

comply with the original deed; but such is not the case. 2 Devlin, Deeds (2d ed.), § 698. There is no other deed or paper in evidence, signed by the grantor in the deed in question, which tends to show that section 17 was intended; nor is there anything on the face of the deed which demonstrates that the record is erroneous. Upon the whole case, we think that we should be deciding without evidence if we were to hold that section 17 was intended, where section 19 is plainly written. As to this forty acres, therefore, the plaintiff's title is not proven, and he cannot recover.

3. As to the ancient tax deeds held by Marathon county upon a part of the lands in question, the situation and proof was this: The defendant offered in evidence the record of the tax deeds covering, respectively, the S. W. ¼ of section 17 and the N. W. ¼ of section 20 in the town of Texas, both being issued for the taxes of 1863 upon the sale of 1864; also the record of a tax deed covering the N. ½ of the S. E. ¼ of section 5, issued for the tax of 1878, sale of 1879. In order to defeat the two first-named deeds, the plaintiff offered the tax roll of the town of Texas, which was produced and identified by the county clerk, in which appears an entry opposite each of the descriptions in the column marked "Remarks," "Paid April 15, '64." These entries were objected to as insufficient to show payment, and as incompetent. We do not perceive in what respect the entries were either insufficient or incompetent. It was the duty of the town treasurer to note the payment of the taxes upon the tax roll, if paid to him. Sec. 1095, Stats. 1898. The tax roll itself is made by the statute presumptive evidence of the facts stated in it. Sec. 4162, Stats. 1898. The entries upon the roll must be held as competent and sufficient evidence to prove the payment of the taxes named.

As to the N. ½ of the S. E. ¼ of section 5, the plaintiff offered the stub receipt book of the town for the year 1878, in which appeared a stub receipt, signed by the town treas-

urer, showing payment of the taxes upon said land for 1878. This, also, was objected to as incompetent; and the case of *Pier v. Prouty*, 67 Wis. 218, is relied upon to support the objection. By sec. 1095, Stats. 1898, it is made the duty of the town treasurer to make a duplicate stub receipt whenever he receives payment of any taxes; and by sec. 1096, Stats. 1898, he is required to compare the stub receipt book with the tax roll, and return it with the tax roll to the county treasurer. Sec. 1096 further provides that such stub book shall have the same effect as evidence as the original receipt. Under these sections there seems no room to doubt but that the stub receipt was competent and sufficient evidence of the payment of the tax. While it was said in *Pier v. Prouty*, *supra*, that such stub book was incompetent evidence, it seems very clear that sec. 1096 was not called to the attention of the court, and was not in mind. It cannot be considered as controlling, in the face of the express provisions of the statute.

The conclusion reached as to the three ancient tax deeds held by the county is that the evidence sufficiently shows that the taxes were all paid, and hence that the deeds were void.

As to the two parcels of land in the town of Texas, the plaintiff also offered in evidence certain entries in the county clerk's sales book of 1864, opposite the descriptions of said parcels, to the effect that the taxes thereon were redeemed by Henry Walton June 14, 1869. These entries were objected to as incompetent evidence, and we think they were clearly incompetent. They were made, as appears on their face, more than a year after tax deeds had been issued and recorded, and when no redemption could be made. No officer being empowered to receive redemption moneys at that time, it seems plain that no entry purporting to show such a receipt could be admissible.

By the Court.—As to the N. E. ¼ of the S. W. ¼ of section 17 the judgment is reversed, and as to the remainder

of the judgment the same is affirmed, and the action is remanded with directions to modify the judgment of the circuit court in accordance herewith. The appellant will recover costs to be taxed, except that no printing will be allowed.

RELYEA, Appellant, vs. TOMAHAWK PULP & PAPER COMPANY, Respondent.

April 9 — April 30, 1901.

Master and servant: Personal injuries: Safe place to work: Assumption of risk.

1. The general rule that a master must furnish a reasonably safe place to work and reasonably safe appliances is subject to the modification that, but for positive prohibition by law, the master may construct and equip his factory as he sees fit, without liability to an employee who, with knowledge or adequate means of knowledge, chooses to take the risks thereof.
2. Plaintiff for about five years had been employed in factories, and in paper mills most of the time for three years prior to his injury, the last two and one-half months in that of the defendant. He was accustomed to use in his work a pine plank, pivoted by a bolt at one end, and resting loosely at the other on a smooth iron plate, covered with grease. *Held*, that the risk of the wearing of the plank, by continually swinging around an iron bolt as a pivot, and the probability of its slipping on the smooth and greasy iron surface, if by leaning over he subjected it to lateral pressure, were perils plain before his eyes, of which he must be deemed to have assumed the risk.
3. Where the perils of the employment have developed in the natural course of the use of appliances by an employee and his companions, failure to observe them is quite as inconsistent with due care on his part as on the part of the employer or any of his representatives, and the employee must be held to have known and assumed the risks of such disrepair by continuing in the employment without protest.

APPEAL from a judgment of the circuit court for Lincoln county: CHAS. M. WEBB, Judge. *Affirmed.*

An action for personal injuries received by the plaintiff while engaged as back tender in the paper mill of the defendant, on June 28, 1896. Plaintiff was substantially twenty years of age, had been employed in factories from the time he was fifteen, and in paper mills most of the time for three years prior to his injury, in and about work similar to that he was required to do for the defendant. He had been employed in the same capacity in defendant's mill, and about the same machine, for two months and a half, at the time of his injury. That machinery consisted of, first, what is known as the press machine, consisting of rolls whereby the water is pressed out of the pulp, and it reduced to such consistency as to enable it to be carried along as a sheet of paper. Thereupon it passed from the upper part of the press machine across a space of about three feet, to the drying machine, which consisted of a series of large steel rolls, heated, around which, in succession, it was to pass to be dried. These rolls, in number fourteen, some three feet in diameter and five feet in length, were arranged successively in a longitudinal iron frame, which rose about eighteen inches from the floor, and at each roll was surmounted by a structure to support the journal of the roller. The top of this frame was flat iron, five or six inches in width, and apparently might be used by the employees to step up onto or stand upon if necessary. This longitudinal frame was interrupted between the press machine and the dryer, there being a space of about two feet and a half, where it was cut away to enable easy access for a man between the last press roll and the first dryer roll to carry the paper sheet across whenever necessary, and to engage it with the sheet of felt which carried it along under the front side of the first dryer roll. In this process it was customary for one man to stand in the space between the press machine and the first dryer

roll, and for another man, usually the plaintiff, to stand upon a board which spanned this breach in the iron frame. That board was fastened to the frame at the dryer side of this opening by a securely fastened bolt, on which it moved as a pivot, being swung into place with the other end resting upon the frame of the press machine, without anything to secure it. When not in use for the purpose above stated, it was ordinarily thrown open, and back against the dryer machine. It had been in use for about a month before plaintiff's employment, and continuously up to the time of the injury. It had on one occasion worked loose around the bolt, and a washer had been put on, and the bolt again screwed down and battered down, so that it was tight, and some force had to be exercised to push the board around so as to span the opening or to pull it out of the way. Where the free end rested upon the iron frame of the press machine the iron was smooth, and was subject to the continual dripping of oil and grease. The board was about the same width as the iron frames on which its two ends rested, and neither before nor after the accident had it been discovered but that it rested smoothly and securely at both ends. On the day in question the plaintiff mounted this board for the purpose of carrying the end of a sheet of paper from the press over to the dryer roll, standing about midway between the two, and apparently a couple of feet from the latter. He observed a stray piece of paper sticking to the dryer roll, which it was necessary to remove, and, still standing upon the board, he reached over diagonally into that machine, and attempted to pick it off at a point just above the point of contact between the rapidly moving felt and the hot dryer roll, whereupon, according to his story, the board tipped a little and slipped out backward, and he was thrown forward, and his hand drawn in between the roll and the felt and injured. He had occasion to use this board from five to fifteen times per day, and, while it was

sometimes swung in and out of place by his associate, that was frequently done by himself. Some evidence was offered that such boards were not ordinarily used in other factories, and the plaintiff testified that he had never seen one elsewhere; that in some he was accustomed to stand upon an iron step made for the purpose, and in others to stand astride of the opening, with a foot on the frame of each machine. At the close of the evidence a verdict was directed for the defendant, upon which judgment was entered, whence this appeal.

J. C. Kerwin, for the appellant.

For the respondent there was a brief by *A. H. Woodworth*, attorney, and *Curtis, Reid, Smith & Curtis*, of counsel, and oral argument by *Mr. Woodworth* and *Mr. A. H. Reid.*

DODGE, J. The plaintiff is a little vague as to the specific failure on defendant's part which is claimed to constitute a breach of its duty to furnish a reasonably safe place for plaintiff to work. He seems to assert defect in original construction of the apparatus in using a board pivoted by a bolt at one end, and resting loosely at the other on a smooth iron plate, because the defendant should have foreseen that by continual use the pivot would become loose, the board would become uneven, and the iron surface, on which the loose end rested, would, by dripping of oil, become slippery, so that that end of the board might slip off. He seems also to suggest that defendant was negligent because some or all of these troubles had ensued and not been repaired. The trial court held that no defect in original construction was assigned by the complaint, and that the mere lack of repair was necessarily as obvious and well known to plaintiff as to the master or any of its employees, and he must be held to have either assumed the risk thereof or been as much guilty of negligence in using the device as the master was

in permitting it to remain for use. The general principles of law governing this class of cases are now so trite as hardly to justify their restatement. The general rule that the master must furnish a reasonably safe place and reasonably safe appliances is subject to the modification that, but for positive prohibition by law, the master may construct and equip his factory as he sees fit, without liability to an employee who, with knowledge or adequate means of knowledge, chooses to take the risks thereof. *Osborne v. Lehigh Valley C. Co.* 97 Wis. 27; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1. In the light of this rule it matters little whether the arrangement in question was vicious in original design and construction, because likely to become loose and insecure as a necessary result of its ordinary use, or because the unsecured end was naturally likely to slip out from under one using it, or whether it had become dangerous by getting out of repair in these respects. There can be no doubt that any such peril from original construction or any defect which had developed in the course of its use was as patent to plaintiff as to the defendant. He, a man with five years' mechanical experience, did not need to be informed of the likelihood of the wearing of a pine plank continually swinging around an iron bolt as a pivot, nor of the probability that a plank might slip where it rested loosely on a smooth and greasy iron surface, if by leaning over he subjected it to lateral pressure. These perils were plain before his eyes. He must be deemed to have accepted them and assumed the risk. If, on the other hand, those perils had developed in the natural course of the use of the appliances by himself and his companions, failure to observe them would be quite as inconsistent with due care on his part as on the part of any representative of the employer, for the very use he made of them, namely, the opening and closing of the board and stepping thereon in the course of his work, was obviously the surest means of discovering such defects as are

now claimed to have existed. He must, equally, be held to have known and assumed the risks of such disrepair by continuing in the employ without protest. The action of the trial court in directing verdict for the defendant was therefore justified on the ground that plaintiff had assumed the risks of the defects from which he claimed to have suffered, and we need not consider whether the testimony as to existence of such defects was credible in view of the physical facts, nor whether plaintiff was conclusively shown guilty of contributory negligence in the performance of his work, both of which questions are discussed.

We find nothing material to our conclusion in the rejection of certain evidence. The result must have been the same had it been admitted and considered.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

THE STATE EX REL. R. CONNOR COMPANY and another, Respondents, vs. WALLMAN, imp., Appellant.

April 10 — April 30, 1901.

Logging highway: Appeal from order laying out: Action of commissioners: Certiorari: *Questions reviewed: Motion to quash.*

1. Sec. 1299*i*, Stats. 1898, provides that when a proper petition for the laying out of a temporary logging road has been presented to the supervisors of the town, such supervisors shall proceed to lay out such highway in the manner in which public highways are laid out, except as otherwise therein provided, but does not, in express terms, give a right of appeal to the county judge, etc. *Held*, that under said statute no right of appeal exists. The fact that the supervisors are to proceed to lay out the proposed logging road in the same manner as public highways are laid out, means nothing more than that their action and course of procedure shall con-

form to those requirements, and to attempt to supply a grant of a right to appeal by inference is beyond the limit of judicial construction.

2. *Certiorari* to review the action of commissioners appointed on appeal to the county judge brings up for review only the proceedings of said commissioners, and does not bring up the original proceedings from which the appeal was taken; hence the question whether the original proceedings by the supervisors are void, because the statute under which they proceeded is invalid, is not before the court for review.

3. In such case, where the petition for the writ shows that the original proceeding, and the action taken under it, are invalid, such fact only bears upon the question of whether the action of the commissioners is harmful and such as will justify the court in entertaining the writ and exercising its discretionary power, and is no ground for a motion to quash the writ.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

In June, 1900, the *R. Connor Company* and *W. D. Connor* presented a petition to the town board of the town of Cleveland, setting out that they were the owners of certain timber lands, and asked that a temporary logging road be laid out across lands owned by the defendant *Wallman*, under sec. 1299*i*, Stats. 1898. After a hearing had been had, the board made an order laying out such road, which was to remain in existence for ten years. Damages were ordered and tendered to the owner, which were refused. Thereupon *Wallman* attempted to take an appeal, and made application to the county judge of Marathon county for the appointment of commissioners to review the action of the town board. Such commissioners were duly appointed, viewed the premises, took testimony, and thereafter made a decision reversing the order of the supervisors. Thereupon the *R. Connor Company* and *W. D. Connor* sued out a writ of *certiorari* to review the action of the commissioners, claiming that no appeal lay from the decision of the town board under the statute, and that no sufficient bond had

been given by the appellant, if such appeal was permissible. Due return was made to the writ, and *Wallman* became a party to the proceeding. Upon the hearing in court, he moved to quash the writ and for judgment affirming the action of the commissioners. This motion was denied, and a judgment was entered setting aside the decision of the commissioners, with costs. From this judgment *Wallman* has appealed.

For the appellant there was a brief by *Louis Marchetti*, attorney, and *Bump, Marchetti & Bump* and *C. B. Bird*, of counsel, and oral argument by *Mr. Marchetti* and *Mr. E. L. Bump*.

For the respondents there was a brief by *Brown, Pradt & Genrich*, attorneys, and *Ryan, Hurley & Jones*, of counsel, and oral argument by *Neal Brown*.

BARDEEN, J. The matter sought to be reviewed by this proceeding is the validity and legality of the action of the commissioners appointed on *Wallman's* appeal from the action of the town board. If no such appeal is provided for by law, then it must be conceded that their action was invalid and was properly reversed. The original proceeding was instituted by two owners of timber lands for the laying out of a temporary logging road, under sec. 1299*i*, Stats. 1898. That section provides that, when a proper petition has been presented, "such supervisors shall proceed to lay out such highway in the manner in which public highways are laid out, except as otherwise provided herein." It gives no right of appeal to either petitioners or landowners, and none exists, unless it may be inferred from the language of the statute above quoted. Counsel for defendant were frank enough to admit that it was doubtful if any such right existed. While we do not consider that admission binding either upon the counsel or the court, a careful consideration of the statute convinces us that it is well founded. The fact

that the supervisors are to proceed to lay out the proposed logging road in the same manner public highways are laid out means nothing more than that their action and course of procedure shall conform to those requirements. There is no grant of right of appeal either to the petitioners or the landowners, and to attempt to supply it by inference would be going beyond the limit of judicial construction. It is suggested that, if no right of appeal is given, the statute is invalid. It was ruled to the contrary in *State ex rel. Andrews v. Oshkosh*, 84 Wis. 548. Moreover, the validity of the statute is not here for review. The *certiorari* is to review the action of the commissioners appointed on defendant's appeal to the county judge, not the action of the town board in laying out the logging road. Their action may be entirely without justification. The original proceeding may be void because the statute is unconstitutional, or because the road described in the order laying it out does not connect with any other public road, yet we cannot determine that question, because those proceedings are not before us for consideration.

It is said that, inasmuch as the petition for the writ shows that the original proceeding and the action taken under it are invalid, the motion to quash performs the office of a demurrer, and should have been granted. This does not necessarily follow. As already suggested, we can only review such of the proceedings as are attacked by the writ. The fact that the original proceedings may be invalid only bears upon the question of whether the action of the commissioners is harmful, and such as will justify the court in entertaining the writ and exercising its discretionary power. If the original proceedings are invalid, it may be that the relators are not harmed by the unauthorized action of the commissioners. But the question of injury to the moving party is not always the test whether the court will entertain the proceedings. Many cases might be cited where the court

has reversed the action of some inferior body or tribunal, on the ground that the record showed want of power or jurisdiction in the matter. Because of such infirmities, it may have been incapable of enforcement, and therefore harmless in point of law, as against the complaining party; yet the courts seldom hesitate, for that reason alone, to clear the record and set aside the proceeding attacked. Confessedly, the action of the commissioners was without justification. The court being powerless in this proceeding to reach back and seize upon the record of the town board and reverse its action, no reason is apparent why so much of the record as was before the trial court, and was found to be without lawful warrant, should not be corrected. This was done by the judgment of reversal of the action of the commissioners. The defendant has no ground for complaint.

By the Court.— The judgment is affirmed.

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110 316
112 [1]346

110 316
117 [2]654

THE MINNESOTA STONEWARE COMPANY and others, Appellants, vs. MCCROSSEN and another, Respondents.

April 10—April 30, 1901.

Power of attorney to sell land not power to mortgage: Extending power by parol: Married women: Mortgages: Homesteads: Estoppel: Change of residence: Abandonment.

1. A power of attorney "to sell and convey any real estate" of the grantor imports authority to sell out and out for cash, and does not include power to mortgage.
2. A power of attorney to sell and convey real estate cannot be extended or changed by subsequent oral authority so as to authorize the agent to mortgage the land.
3. The homestead right is not exclusively for the benefit of married women: it extends to the whole family, and prevents the doctrine of equitable estoppel from nullifying the statutory requisites to the alienability of a homestead.

4. A husband, acting under a power of attorney from his wife to sell and convey any lands in which she might have an interest, executed and delivered a mortgage on their homestead by signing the wife's name, in order to secure the payment of money borrowed for the benefit of the wife and which she actually accepted and used, she orally consenting thereto. *Held*, that the wife was not estopped to deny the validity of the mortgage.

5. Where the owner of a homestead testified that his moving with his family to a distant state, where he remained more than three years, was temporary and without intent to abandon his homestead, and the circumstance that the moving was for the sole purpose of benefiting his wife's health was established by his own evidence and that of other witnesses, the fact that while in the state to which he moved he voted at general and municipal elections is *held* insufficient to overcome a finding of fact by the trial court that such removal was for a temporary purpose without intent to abandon the homestead, but, on the contrary, with intent to reoccupy it as such.

APPEAL from a judgment of the circuit court for Marathon county: CHAS. M. WEBB, Judge. *Affirmed in part; reversed in part.*

Action by judgment creditors of *J. A. McCrossen* to reach real estate claimed by him as his homestead, *James McCrossen* being joined as mortgagee. The complaint was to the effect that the real estate described, located in the city of Wausau, Wisconsin, was *J. A. McCrossen's* homestead when the mortgage thereon, owned by *James McCrossen* and particularly described, was given; that such real estate subsequently ceased to be the homestead of the mortgagor, by reason whereof plaintiffs' judgments, which were particularly described, attached thereto as liens; that the mortgage was void because it was not signed by the mortgagor's wife.

The answer put in issue the allegations of the complaint as to the real estate ceasing to be a homestead and the mortgage not being signed by Mrs. McCrossen; and it was therein alleged that she, for the purpose of empowering her husband to borrow money on the homestead to invest in a

business for her, on February 12, 1894, gave to him a power of attorney in writing, authorizing him as follows: "In my name, place, and stead to sell and convey any real estate and personal property which I may now own or may hereafter acquire in the states of Wisconsin and Washington;" that under such authority, and at the express request of Mrs. McCrossen, her husband, defendant *J. A. McCrossen*, borrowed $2,500 of the Stuart Lumber Company and secured the payment thereof by the mortgage in controversy, all parties in the transaction, including Mrs. McCrossen, believing that the power of attorney was broad enough to authorize *Mr. McCrossen* to sign his wife's name to the instrument with the same force and effect as if she signed it by her own hand; that the money was actually invested in business for Mrs. McCrossen, and that the mortgage was thereafter, for value, assigned to defendant *James McCrossen*.

The facts stated in a general way were set up in the answer as a counterclaim, and affirmative relief was prayed for. The court found the facts requisite to plaintiffs' right to challenge the validity of the mortgage and of *J. A. McCrossen's* right to hold the realty as a homestead, and decided that such right existed when the mortgage was executed; that it was executed substantially under the circumstances stated in the answer and for the purpose therein alleged, i. e., to obtain money with which to start a business in the name of and for the benefit of Mrs. McCrossen; that such purpose was fully carried out; that before the commencement of the action *James McCrossen* became the owner of the note and mortgage; that on May 1, 1894, *J. A. McCrossen*, with his wife and family, temporarily removed from the homestead to engage in business and live in the state of Washington, Mrs. McCrossen disposing of her business in Wausau in order to use the proceeds in the new venture; that the temporary removal was for the benefit of Mrs. McCrossen's health; that the McCrossens did not, at the time of such removal or at

any time thereafter, intend to abandon their Wausau homestead, but on the contrary that they proposed at all times to return and occupy it, the particular time being uncertain till after the death of Mrs. McCrossen; that she died at Everett in the state of Washington in April, 1895, when and where she had an interest in a store in which her husband was a clerk; that after her death he ceased to work in the store, but did not withdraw the interest of his wife's estate therein; that he attended to some business in the state of Washington subsequent to his wife's death, including the operation for a few months of a small shingle mill, and that in the fall of 1897 he returned to Wausau to reside, leaving his children at Everett till the close of the term of school, when they also returned to Wausau to reside with their father; that the homestead was not occupied by him after such return and before the trial because he had not perfected his arrangements to commence housekeeping; that his purpose was to reoccupy the homestead with his family at the expiration of an existing lease thereof; that he did not acquire a homestead while in the state of Washington, but that he voted in such state three times, once at a national election and twice at municipal elections.

On such facts the court decided that at the time of the rendition of the plaintiffs' judgments the realty was, and up to the time of the trial continued to be, the homestead of *J. A. McCrossen;* that such judgments never became a lien thereon; that the mortgage was valid as to the parties thereto, including Mrs. McCrossen, and as to the creditors of *J. A. McCrossen;* that the latter was entitled to a judgment dismissing the action with costs, and that *James McCrossen* was entitled to a like judgment for costs and a judgment establishing the validity of the mortgage against *J. A. McCrossen* and plaintiffs. Judgment was rendered accordingly.

For the appellants there was a brief by *Brown, Pradt & Genrich,* and oral argument by *Neal Brown.*

For the respondents there were briefs by *Ryan, Hurley & Jones*, and oral argument by *M. A. Hurley*.

MARSHALL, J. The question of the validity of the mortgage involves three questions: (1) Can the homestead of a married man be alienated without the signature of his wife being affixed to the instrument of conveyance by her own hand with intent to cause such alienation? (2) Does a power to sell and convey real estate include power to mortgage the same? (3) Does a conveyance of the homestead of a married man, executed by him, with the wife's signature affixed thereto by her verbal request, for the purpose of obtaining money for her use, together with a full execution of such purpose, operate by estoppel to alienate such homestead?

As we view the last two propositions the first need not be considered. If the power of attorney to sell and convey did not authorize the act of *J. A. McCrossen* in signing his wife's name to the mortgage, and the circumstances under which the transaction occurred are not sufficient to render such signing equivalent to the personal signature of Mrs. McCrossen by estoppel, it is immaterial whether such personal signature was necessary or not.

The power of attorney was a mere power to sell and convey, importing authority to sell out and out for cash and not power to mortgage. That is elementary. Jones, Mortgages, § 129; Devlin, Deeds, § 363*a*; *Morris v. Watson*, 15 Minn. 212; *Colesbury v. Dart*, 61 Ga. 620; *Wood v. Goodridge*, 6 Cush. 117; *Hoyt v. Jaques*, 129 Mass. 286; Perry, Trusts, § 768. No departure from such general rule, worthy of consideration, we venture to say, can be found. There is a contrary line of decisions in the state of Pennsylvania, commencing with *Lancaster v. Dolan*, 1 Rawle, 231, decided in 1829, and based on an overruled English case. The initial decision, though recognized as wrong tested by the generally accepted doctrine on the subject, was followed

in that state until, as we understand by what is said in *Zane v. Kennedy*, 73 Pa. St. 182, it was deemed too firmly ingrafted upon the judicial system of the state as a rule of property to be dislodged. Nevertheless, in a recent case, *Campbell v. Foster H. Asso.* 163 Pa. St. 609, decided in 1894, it was so evident to the court that the doctrine in *Lancaster v. Dolan*, as it had been considered, was so out of harmony with the rule prevailing elsewhere, that it was practically overruled by confining it to the precise situation before the court when it was decided,— that of a power coupled with an interest. This language was used:

"It cannot be questioned but that a mere naked power to sell and convey does not include a power to mortgage."

The Massachusetts court, speaking on the subject in *Hoyt v. Jaques*, *supra*, said:

"In the ordinary case of a power 'to sell and convey' land, given by a principal to his attorney, it is clear that the attorney would not be authorized to mortgage the land. The two transactions of a sale and a mortgage are essentially different."

The learned counsel for respondents favor us with an interesting and very full discussion of the subject of judicial construction of powers of attorney, covering the whole field thereof, including that of practical construction, but we are unable to see how any rule on the subject has anything to do with this case. No principle is better understood than that a written instrument, not ambiguous either in its literal sense or in the application of its language to the subject or purpose thereof, must be taken to mean what it says, reading it in the sense in which its words would be ordinarily understood, and that where an ambiguity is raised by applying the language of an instrument as before indicated, it cannot be solved by resorting to a meaning not within the reasonable scope of such language. In other words, language cannot be judicially extended beyond its reasonable scope in order to effect the intent of parties, however obvi-

ous that intent may appear; for the purpose of all rules for judicial construction is to get sense out of words, not to put sense into them. The rule for practical construction is no exception to that. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258. There is no ambiguity in the language of the power of attorney in question. It is the plainest kind of a mere grant of authority to sell and convey real estate, and the court is powerless to make it anything else by any legitimate exercise of judicial power.

The idea is advanced that written authority to an agent may be extended by subsequent oral authority. That is so in many cases, but not where the authority is required by law to be in writing. A power to sell and convey real estate can no more be extended or changed by parol than can a conveyance of real estate. That is so elementary that the suggestion of respondents' counsel to the contrary does not require further notice.

It is claimed that Mrs. McCrossen was bound by estoppel; that she was powerless to accept the benefit of the money obtained by the mortgage given by her consent, and then successfully raise the question of want of authority to sign her name to the instrument under the general power of attorney or the verbal request. That point is ruled against respondents by *Cumps v. Kiyo*, 104 Wis. 656. It was there held that the protection which the law of this state throws around the homestead right is not exclusively for the benefit of married women,—that it extends to the whole family, rendering the homestead inalienable otherwise than in the precise manner indicated in the statute. It was there said that the doctrine declared does not go so far as to prevent a married woman from being bound by estoppel on the specific question of whether a particular piece of property is or is not a homestead, or that a paper signed by her purporting to convey the homestead was so intended, but does prevent the doctrine of equitable estoppel from nullifying the

statutory requisites to the alienability of a homestead. The subject there received very careful consideration. The conclusion arrived at is in harmony with the plain intent of the statute, with previous declarations of this court on the subject, and authorities elsewhere. No reason is perceived why the subject should be reconsidered.

There is left the question of fact, upon which the case mainly turned, as to whether the removal of *Mr. McCrossen* from the homestead was for temporary purposes, with intent not to abandon it as a homestead but to reoccupy it as such, as found by the court. We shall not discuss at length the evidence upon which such finding was made. The trial judge saw the witnesses. He heard the testimony. His opportunity for discovering the truth from what was said and all the circumstances disclosed, as has often been said, was far superior to that possessed here. The presumption is that he reached a correct conclusion, and that presumption is so strong that it cannot yield so easily as to be disturbed by a conclusion here, from reading the evidence, that it preponderates, merely, against the decision. That rule has been very, but not too, often declared. The force of it seems to be so frequently misconceived that reiterations thereof, in language calculated to give it that significance which it really has in our system, seem proper. When it is comprehended that the decision of a trial judge on a question of fact must stand as a verity unless shown to be clearly wrong by a decided preponderance of evidence against it, outweighing the contrary evidence and the presumed advantages which he may legitimately have had in discovering the truth that do not appear in the record, one will take in the full scope of the effect of such decision and appreciate the great power which the trial judge exercises in such matters. It is a power but little less than that exercised by a jury in deciding questions of fact. The proper exercise of it calls for the most careful scrutiny of the evi-

dence to the end that right may prevail over wrong so far as practicable. The most weighty responsibility incident to the judicial office in trial courts, in civil matters, is that involved in the proper determination of questions of fact upon evidence, because, unlike a wrong decision on a question of law, one on a question of fact may be safe against challenge in an appellate court because of the presumed superiority of opportunity of the former over the latter, which may not, probably does not, in all cases, exist, for separating the right from the wrong.

In this case there is the very significant circumstance that *Mr. McCrossen* exercised the elective franchise in the state of Washington three times while residing there. We must presume that the essentials of citizenship are the same in that state as here, and that *McCrossen's* assertion of the right of citizenship, as indicated, was inconsistent with his possessing a homestead in the state of Wisconsin. But we cannot say that such circumstance is conclusive. He violated the law in voting, or he committed perjury in testifying that his residence in the state of Washington was for mere temporary purposes and that his intention at all times was to return to the Wisconsin homestead. The trial court concluded from all the circumstances that he testified to the truth. It seems, looking at the record alone, that there is room for a different conclusion. But there are many cases in the books where it has been held that the mere act of voting at a particular place is not conclusive on the question of residence. Many well-considered cases of that kind are cited to our attention in the brief of counsel for respondents. *Robinson v. Charleton*, 104 Iowa, 296; *Dennis v. Omaha Nat. Bank*, 19 Neb. 675; *Mallard v. First Nat. Bank*, 40 Neb. 784; *Corey v. Schuster*, 44 Neb. 269; *Campbell v. Potter* (Ky.), 29 S. W. Rep. 139. In the last case cited the Kentucky court said:

"This court has held that the homestead right is never forfeited when there has been an occupancy and then a temporary removal with the intent to return and make the

premises a home. Appellants endeavored to show that the appellee abandoned all purpose to return to the property and that his residence had been permanently located elsewhere by proving that he registered and voted in wards in Bowling Green other than the one in which his home was situated. The proof shows that he did this. This act is not conclusive of the question, but is merely a fact, in connection with the other facts proven, to aid the court in determining whether the removal of the appellee from the premises was permanent or temporary The court holds that the act of registration and voting are not sufficient to overcome the weight of the testimony which conduces to prove that the removal was temporary."

Courts generally, that have spoken on the subject, reason in the same vein. In this case the circumstance of voting in the foreign jurisdiction was rebutted by the positive evidence of *Mr. McCrossen* of his purpose in going to the state of Washington and his intention at all times to return, and the circumstance, established by his evidence and that of other witnesses, that the removal to Washington was for the sole purpose of benefiting Mrs. McCrossen's health. In view of all the evidence in the record, and the weight, as above indicated, to be given to the decision of the trial judge, we cannot say that such decision is against the clear preponderance of the evidence. Therefore it cannot be disturbed.

By the Court.— The judgment rendered in favor of defendants for costs, establishing the homestead right of *J. A. McCrossen*, is affirmed. The judgment establishing the validity of the mortgage is reversed. No costs in this court will be allowed in favor of either party to the appeal, except the appellants shall pay the clerk's fees. The cause is remanded with directions to modify the judgment entered so that it will decree the invalidity of the mortgage in accordance with this opinion.

BARDEEN, J., took no part.

110 326
116 646

McClellan, Appellant, vs. Chippewa Valley Electric Railroad Company, Respondent.

April 11 — April 30, 1901.

Street railways: Personal injuries: Negligence: Contributory negligence: Pleading: Evidence: Wilful misconduct.

1. Plaintiff, driving on a load of hay, turned into a street used by an electric railway, and, while driving on the track, was struck by a car coming up from behind at a speed of from twelve to fifteen miles an hour and injured. *Held*, that if the car was actually in sight when he entered on the track, it was his duty to see it, and that he was guilty of contributory negligence if he did not see it, notwithstanding he testified that he looked and did not see any car.
2. In such case, if the car was not in sight when he drove upon the track, he was guilty of contributory negligence in traveling 300 feet along the track without looking for the approach of a car.
3. A complaint simply charging negligence states a different cause of action from one charging wilful misconduct or a wanton and reckless act equivalent to wilful misconduct, and evidence of such misconduct is not admissible under the former.

Appeal from a judgment of the circuit court for Eau Claire county: James O'Neill, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries suffered by the plaintiff by reason of a collision between one of the defendant's street cars and a load of hay upon which the plaintiff was riding. The accident happened upon the 12th of June, 1899, at about 8:10 p. m., on Putnam street, in the city of Eau Claire. Putnam street runs directly north and south, and is sixty-six feet in width, and is practically level. It is crossed by Madison street, running directly east and west, and a single track of the defendant's street railway runs east upon Madison street until it reaches Putnam street, where it turns and runs north in the middle of Putnam street for several blocks. Fay street, which runs in a northwesterly direction, comes into Put-

nam street at a distance of 422 feet north of Madison street, its width being seventy-three feet measuring along the west line of Putnam street. Birch street, running directly east and west, crosses Putnam street 422 feet north of Fay street. The evidence shows that on the evening in question the plaintiff, who was driving a team of horses attached to a load of hay and standing up upon the load, drove northwesterly on Fay street to Putnam street, where he turned directly north, intending to drive along Putnam street until he reached his own house, which was located on the west side of Putnam street in the block north of Birch street; that a man named Palmer, of whom the plaintiff had purchased the hay, followed the plaintiff, riding in a buggy, some three or four rods in the rear; that the plaintiff drove northward on the west side of the street-railway track on Putnam street, and at some point between Fay street and Birch street drove onto the street-railway track and traveled north on the track for some distance,— the point where he entered upon the track and the distance which he drove thereon not being clearly fixed; that at some point before he reached Birch street, while he was still upon the track, one of the defendant's interurban street cars came up from the south, and struck the load of hay with considerable force, breaking the pole of the wagon, throwing the plaintiff off from the load, and injuring him, and causing the horses to run away. The plaintiff claims that he looked south for a car when he first entered on Putnam street, and also when he turned upon the track, and that there was none in sight. The negligence claimed was in the running at an excessive rate of speed and in the giving of no warning signal. The car was an interurban car, running between Eau Claire and Chippewa Falls, and weighed about 11,000 pounds, being considerably larger than an ordinary street car. The evidence showed that it was light enough at the time of the accident so that one could see two blocks or

more, and that there was a headlight upon the street car. Palmer testified that no bell was rung by the motorman, and that the car was going at the rate of twelve or fifteen miles an hour, and did not slacken its speed prior to the collision. The conductor of the car testified that he gave a signal to stop the car in the middle of the block, and that the motorman answered it by a single tap of the gong; the signal being given because a passenger wished to get off at Birch street. The plaintiff testified that the first notice he had of the approach of a car was when he was struck.

At the close of the plaintiff's case a motion for nonsuit was sustained, and from judgment thereon the plaintiff appeals.

For the appellant the cause was submitted on the brief of *V. W. James.*

For the respondent there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *R. P. Wilcox.*

WINSLOW, J It is impossible to tell with any degree of certainty from the evidence at what point the plaintiff drove upon the street-railway track, or what distance he traveled upon the track, or where the collision in fact occurred. The plaintiff's verified complaint (which has never been amended) states that while he was driving along Putnam street, at a point about 100 feet south of Birch street, he attempted to cross the track from the west to the east side of the street, and while in the act of crossing was struck by the car. It appears that he was examined as an adverse party before the trial, and he admits that he then testified that he had traveled on the track but a little ways before the accident happened; also that he then testified that he had traveled probably the length of his wagon, or twice that length, on the track, before he was hit; but he now says that he made a mistake in so testifying. Upon the trial he testified that he had driven upon the track the width of two lots fifty or

sixty feet wide before he was struck; that he first drove upon the track in front of a house No. 540 Putnam street (which is shown by the evidence to be 288 feet south of Birch street crossing, and hence 139 feet north of Fay street); that he was struck about two rods south of a certain row of trees on the west side of Putnam street (the most southerly of which is shown by the evidence to be seventy-two feet south of Birch street); and that he fell from the load on the south crossing of Birch street, and was dragged by the horses north across Birch street. Palmer testified upon the trial that the plaintiff drove north on the west side of Putnam street about one third of the block (142 feet); that he then turned onto the track, and drove north on the track about one third of the block, when he was struck as he got up by the trees. Upon being recalled, Palmer testified that when he (Palmer) was two or three rods north of Fay street he looked south, and saw the car coming about the middle of the block between Madison and Fay streets; that plaintiff was then three or four rods ahead of him, and was on the track, and had been on the track for a distance of five or six rods. If this be true, *McClellan* must have driven on the street-railway track from one to two rods after entering on Putnam street. The plaintiff testifies positively that he looked south for a car when he drove onto Putnam street, and again when he drove onto the railway track, and that none was in sight on either occasion, and that he did not look south again.

The evidence of Palmer is that the car was traveling from twelve to fifteen miles per hour, and did not slacken its speed; and this is the only evidence as to the speed of the car. The plaintiff says that his team was walking, but he does not fix the speed. While it is impossible to reconcile all of the evidence, there are certain results which may be deduced therefrom with certainty. If plaintiff entered on the track after traversing one third of the block (142 feet), and traveled north one third of a block, he was 637

feet north of Madison street when he entered the track and 779 feet north thereof when he was struck. If he traveled three miles an hour (certainly a very moderate estimate), and the car traveled fifteen miles an hour (the highest estimate given), the car would have traveled but 710 feet while the plaintiff was traveling 142 feet on the track, and must have been in sight on Putnam street when the plaintiff entered on the track, when he testifies that he looked and did not see it. If, however, the car was not actually in sight when plaintiff drove on the track, because it had not yet turned the corner at Madison street, then the plaintiff must have turned onto the track substantially immediately after he entered on Putnam street, as seems to be the result of Palmer's last evidence, and in this case he must have traveled somewhere from 250 to 300 feet northward along the track without looking for a car. Whichever horn of the dilemma the plaintiff takes, he is convicted of contributory negligence. If the car was actually in sight when he entered on the track, then it was his duty to see it, and he was negligent if he did not see it, notwithstanding he testifies that he looked and did not see it. If, on the other hand, it was not in sight, then it is certain that he traveled nearly or quite 300 feet along the track without looking for the approach of a car. In either case he is guilty of contributory negligence. *Bryant v. Metropolitan St. R. Co.* 28 Misc. (N. Y.), 532.

The claim is now made by appellant that there was evidence in the case sufficient to show a case of wilful intent to injure, or that reckless and wanton disregard on the part of defendant's employees of the plaintiff's rights and safety which is deemed equivalent to an intent to injure, and may be called a constructive intent, and which has been inaccurately termed gross negligence. *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333. With regard to this claim it is sufficient to say that no such cause of action is stated, or attempted to

be stated, in the complaint. The complaint simply charges negligence. Certainly, if wilful misconduct is claimed, or a wanton and reckless act equivalent in law to wilful misconduct, the cause of action is a different one from a cause of action founded upon negligence simply. The defendant is entitled to know what the cause of action is upon which the plaintiff relies. 14 Ency. of Pl. & Pr. 338, § 8.

By the Court.—Judgment affirmed.

STAFFORD, Respondent, vs. CHIPPEWA VALLEY ELECTRIC RAILROAD COMPANY, Appellant.

April 11—April 30, 1901.

110	331
112	[14]231
112	[8]247
112	[8]248
110	331
114	[14] 48
110	331
115	[8]476
116	[8] 27

Street railway: Collision at street crossing: Negligence: Court and jury: Contributory negligence: Duty to look and listen: Motorman: Degree of care: Special verdict: Municipal corporations: Ordinances: Franchise: Validity: Sounding of gong on street car: Violation of ordinance, when negligence per se: *Instructions to jury: Appeal: Judgment on reversal.*

1. It being undisputed that a collision between a street car and a wagon, suddenly drawn upon the track in front of such car, at a street crossing, did not result in any injury to the car other than a few scratches of the paint on the front end; that it did not cause any disturbance of the lights upon the car, the persons in charge thereof, or the passengers thereon, other than that caused by sudden application of the brake and reversal of the current; that the car stopped substantially at the place of the collision; and that it did not materially push the wagon ahead upon the track nor mar nor break it at the point of contact, such physical situation is so inconsistent with the theory that the car was going several miles per hour, for the few seconds required for a traveler, approaching the crossing at a speed of three miles per hour, to travel thirty feet, as to leave no ground for the jury to say that the mere speed of the car was so great as to constitute actionable negligence.

2. Testimony of a person or any number of persons that he or they, when approaching a street-car track with a view of crossing it, looked along the track for a coming car and did not see one, though a car, by reason of physical conditions and distances to be traveled, must have been in plain sight and so near the point of observation as to render an attempt to cross the track in front of it dangerous, is inconsistent with all reasonable probabilities, and the jury should not be required or allowed to consider the subject as involving a disputed question of fact.
3. It is the duty of a person, under the foregoing circumstances, in the exercise of ordinary care for his own safety, to see the danger that is perfectly obvious by reasonable attention to the situation, and not to go upon the track in front of the car that is so near that its speed will necessarily have to be greatly slackened or stopped, or collision with the wagon rendered probable; and failure in that regard is contributory negligence as a matter of law.
4. It is the duty of the traveler upon the street, in approaching a point where he desires to cross a street-car track, to look and listen for a coming car and to perform that duty when and where he will have reasonable opportunity to render his efforts in that regard effective, and it is as much his duty, as a matter of law, to see an approaching car which is in plain sight and in dangerous proximity to the crossing. and not to negligently place himself in the way of it, as it is to look for the car; hence evidence that he performed the duty of looking, but did not see the actually approaching car, does not raise a question of fact.
5. It is not actionable negligence for the motorman in charge of a street car, when the car is in operation upon a street and approaching a street crossing, to fail to exercise the highest degree of care, or such care as a vigilant or prudent person would exercise under the same or similar circumstances. It is sufficient if he exercises the care of a person of average prudence in the same or similar circumstances.
6. In an instruction to a jury the words "ordinarily prudent men," "the great mass of mankind" and "a person of average prudence" express synonymous terms, and when coupled with the words "ordinarily exercised under the same or similar circumstances" express the *quantum* of care required in order to meet the particular danger, or the danger of probability of injury therefrom if not effectually guarded against, as it increases or diminishes.
7. The mere acquirement by purchase of a street-railway franchise containing regulations as to the manner of operating cars, in compliance with a condition of a new and independent franchise

which does not refer to the old grant or in any way make its provisions a part of the new one, such condition being clearly imposed to prevent a conflict of rights, does not add to or restrict the provisions of such new grant.

8. A city ordinance is not valid unless reasonable, and whether it satisfies that requirement or not is a judicial question.

9. A city ordinance requiring the continuous ringing of a bell upon street cars while such cars are in motion upon a street is unreasonable and to that extent void for any purpose, unless made a condition of the grant of the franchise.

10. If such a requirement is valid for any purpose because made a condition of the grant itself, the violation thereof does not constitute actionable negligence or evidence of such negligence, because, as regards the safety of travelers on the street, it is unreasonable.

11. An instruction that a motorman in charge of a street car, when the car is in operation upon a street and approaching a street crossing, must exercise due care or proper care, unexplained, fails to instruct and may mislead. Coupled with instructions to the effect that the term refers to the highest degree of care, or any degree of care other than that of a person of average prudence under like or similar circumstances, it is error.

12. A traveler upon a street at a street crossing, desiring to cross the street-car track there situate, has not the same right to require the speed of a car to be slackened to enable him to pass over the track as the person in charge of the cars has to require him to give way to allow the car to pass.

13. The motorman in charge of a street car approaching a street crossing must use ordinary care for the safety of travelers liable to go into the pathway of the car, but he has the right to expect that such travelers will use ordinary care to inform themselves of the approach of the car and not retard its passage.

14. Where it appears from the evidence that a motion, duly made, to change an answer to a question in a special verdict and for judgment should have been granted, under the rule that the appellant is entitled to have done that which ought to have been done, judgment will be entered in the appellate court remanding the cause upon reversal with directions to the trial court to correct the verdict as indicated and render judgment for the defendant.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to recover compensation for personal injuries

caused under circumstances alleged in the complaint in effect as follows: About 9:30 o'clock p. m., August 27, 1899, while plaintiff and her husband, accompanied by several other persons, in a lumber wagon drawn by two horses, were traveling south on North Farwell street at the crossing thereof with Wisconsin street, a point much used for public travel, said Wisconsin street having a street-railway track in operation thereon by defendant under a franchise limiting the speed of its cars to ten miles per hour, and requiring a bell to be continuously rung on every car while in motion upon a street,— and while they were in the exercise of ordinary care in the act of passing over the street-car track, one of its cars approached such point from the east at a speed of twenty-five miles per hour without any bell being sounded and without the motorman paying any attention to their presence, although their situation of peril was in plain view of such motorman, whereby such car collided with their wagon and overturned it, causing severe bodily injuries to plaintiff, which were described in general language. It was further alleged in effect that the track was laid on a down grade from the east, to the point where the collision occurred, for a distance of several hundred feet; that it was obscured from view from Farwell street, upon which plaintiff was traveling, by a high billboard on the north side of Wisconsin street; that at a point thirty-four feet north of the north rail of the track, a car located thereon at any point to the east could be seen for a distance of about 375 feet; that plaintiff and her associates looked that way for a car while at such point and not seeing any proceeded slowly, turning their attention to the west to see if a car was approaching from that direction; that they again looked east as the horses were on the north rail of the track, when they saw a car approaching, so close to them that it seemed that the only way to save themselves, if any existed, was to complete the crossing; that they endeavored to do so, but

before they got clear of the track the collision and injury occurred.

The answer admitted the collision and injury. It put in issue the allegations of negligence as regards defendant's motorman in handling the car, and pleaded contributory negligence of plaintiff as a defense.

The evidence established beyond controversy the following facts: The night was dark but still, and there was nothing to interfere with hearing or seeing an approaching car while it was a sufficient distance from the Farwell street crossing to enable a traveler upon such street to avoid being injured by it by the exercise of reasonable diligence to that end. Farwell street was a north and south street, and Wisconsin street an east and west thoroughfare, the two crossing each other at right angles at the place of the accident. The street-car track was on Wisconsin street. The north side of the street was about thirty feet from the north rail of the track. For several hundred feet of the approach of the street-car track to the crossing, from the east, it was on a down-grade towards the crossing. Wisconsin street was lighted by electric lights, but Farwell street, in the vicinity of the crossing, was not lighted. The street car that collided with the wagon in which plaintiff was riding was an open car. It was lighted with a number of electric lights and was furnished with a headlight which was burning brightly at the time of the accident. The approaching car could have been plainly seen, by anyone standing within the territory that was common to the two streets, while anywhere within a distance of 800 feet on Wisconsin street from the place of collision. It was seen by many witnesses, several of whom testified for plaintiff, including all who so testified on the subject. The car was but a short distance from the place of collision when the team was within a few feet of the north rail of the track. The evidence was conflicting as to the speed of the horses, but on plaintiff's side it showed that

they were going about three miles per hour. The evidence was also conflicting as to the speed of the car, witnesses placing it from four to twenty-five miles per hour. There was a conflict as to the extent the car bell was sounded and as to what efforts were made to slacken the speed of the car or to stop it immediately before the collision. It was established beyond controversy that the car collided with the wagon back of the front wheels and immediately in front of or with the hind wheels of the wagon, but that the latter were not broken in any way so as to indicate that they came in contact with the car. The owner of the wagon said they were racked a little. The wheels were not splintered or marked, neither was any part of the wagon broken by the collision itself, unless it was the wagon reach. The car was not broken or injured in any way other than a few scratches on the front end. The lights in the car did not go out, nor were they disturbed. The jar of the car was not sufficient to inconvenience the two passengers on the car or attract their attention particularly to the fact that anything unusual had happened. The motorman was not moved from his place at all, neither was the conductor, except slightly, as the brake was put upon the car and the current reversed to stop it. The motorman brought his car to a dead stop almost at the instant of the collision, the location of the car after the stop being about at the manhole in the center of the street. The space occupied by the team and wagon was about twenty-one feet long. When the occupants of the wagon were so located that they had full opportunity to see a car, if one was coming, at any point within 800 feet from the crossing, the horses' heads were about fifteen feet from the north rail of the track; from that time till they were frightened by the approach of the car they traveled about twenty feet, and up to the instant of the collision they traveled about thirty feet. At most, according to the finding of the jury, the car was going not to exceed ten miles per

hour or about three and one-half times as fast as the horses were traveling when the motorman first applied his brake, which was some distance from the point of collision. Plaintiff and some of those who were associated with her in the wagon, at the time of the accident, testified, all agreeing substantially that they looked for a car when they could easily have seen one if it was within a distance of 350 feet from the crossing and when the horses' heads were within about fifteen feet from the north rail of the track, and that the car struck the wagon in the vicinity of the hind wheels. They stated that they looked east and saw no car; that they then looked west and hearing a car approaching, but not seeing it, and supposing it was coming from the west and was obscured by a turn in the track a block away, they continued to look in that direction for a brief space of time till the noise of the car so increased that they were moved to turn and look again to the east, when the car was almost upon them. There was evidence of some disturbance of the horses caused by the approach of the car, but it was practically undisputed that such disturbance did not occur till about the time the horses stepped upon the track and the occupants of the wagon observed their peril.

Stating some of the material evidence more in detail, without attempting to quote what was said by witnesses *verbatim*,— the city engineer stated that by taking an observation east on Wisconsin street at a distance of thirty-one feet and some inches north of the north rail of the track — the point at which it is claimed the occupants looked east — an approaching car could have been seen if located at any point for a distance of 349 feet from where the collision occurred, and that at a point a few inches nearer the track, one could have seen a car located anywhere on the track to the east for a distance of about 800 feet. One of the occupants of the wagon said that when she looked east she could see all the way up to a point which was over 800 feet from the

crossing. Witness Haggarty, for plaintiff, said she saw the team on Wisconsin street; that she saw them when the wagon was coming onto the street; that in an instant or so she saw the car coming at a point that was about 140 feet from the crossing; that her attention was on the car for a brief space of time; that then she heard a person in the wagon "holler," whereupon she looked again at the team and it was on the track, at which time the car was about forty feet from the line of Farwell street; that the team was walking till the front end of the wagon was on the north rail when they commenced to prance from fear. Witness Becker, for plaintiff, said that he saw the occurrence and saw the team and the car shortly before the collision; that when he saw the team first they were just coming over the sidewalk or crossing on the north side of Wisconsin street, and that the car at that time was almost to Farwell street; that the car struck the wagon mostly on the hind wheels; that when he first saw the horses the car was nearly to the line of Farwell street; that the car was a little way up the hill; that the horses were afraid of the car for it was right near them; that he could not tell just where the car was when he first saw the horses. Witness Rustin, for plaintiff, said he saw the accident; that the car passed him at a point that was about 140 feet from the place of the collision, before he saw the team; that when he saw the horses they were near to or on the track and the car between him and Farwell street, and nearer Farwell street; that the car passed him going about twenty-five miles per hour and did not slacken its speed perceptibly till the collision occurred; that it went a little way after the collision. Other witnesses for plaintiff testified that the car was going at great speed before it struck the wagon, some putting it as high as twenty-five miles per hour, and that the motorman made little or no effective effort to slacken the speed of the car; that at the time of the collision there were two reports (one evi-

dently being caused by the collision and the other by the wagon box when it struck the ground). One witness said that he heard a kind of bump followed by a crash. Some thought the first report, and others that the last report, was the louder.

The motorman for defendant testified that as his car approached the crossing and when it was some distance away and before the team came onto Wisconsin street, the brake was partly on; that the car was not going over four or five miles per hour; that when he observed the team making for the crossing he tightened his brake and reversed the current; that the occupants of the wagon were not paying any attention to their situation; that the driver did not pay any attention to the danger till a woman back of him raised up and "hollered," at which time the horses became disturbed; that they jumped right in front of the car; that he did all he could to stop it and had it almost to a full stop when it reached the wagon; that it missed the main wheels and passed in front of the hind wheels; that they struck the drawbar, which extended in front of the car; that the horses jumped, causing the left hind wheel of the wagon to lift up over the drawbar, at which instant the reach parted, causing the box to leave its place on the back hounds; that immediately thereafter the box was overturned and the horses ran away with the front wheels of the wagon; that the car stopped almost instantly after the collision and at the manhole in the center of the street; that the wagon was not broken by the car, nor the car injured in any way by the wagon; that there was no evidence of the accident on the car except a few scratches; that he was not disturbed in his place upon the car, and that the lights were not disturbed. He said he kept a sharp lookout all the time and had his car under complete control, and that he sounded the car gong repeatedly. The conductor on the car said that the team came from the north and right onto the track, and that

the motorman applied his brake and reversed his current as soon as he could, causing the car to stop in about half its length; that the car did not in fact strike the wagon; that it was about to a stop as the left hind wagon wheel struck the drawbar extending in front of the car. The passenger on the car corroborated the motorman and conductor. She said she felt a little shock but did not hear any crash till the car stopped; that she then heard the noise of the wagon; that the car did not move again till it started on the trip. She agreed with the motorman and conductor that the car gong was sounded and that vigorous efforts were made to stop the car. She also agreed with the motorman that the car stopped about at the manhole in the middle of the street. There was other evidence corroborating the testimony of the motorman.

There was evidence of the existence of a street-car franchise adopted in 1888, containing the limitation on the speed of cars and requirement as to the continuous ringing of a bell upon each car while in motion upon the street, alleged in the complaint; also evidence that the franchise granted by such ordinance, subject to such limitation and condition, was the property of defendant by purchase from, through, or under the original grantee. There was also evidence that a new and independent franchise was granted in 1897, under which the railway was being operated at the time of the accident, which ordinance recited that it was granted to take effect on condition that the original ordinance had passed by purchase to the new grantee. The evidence showed that such new ordinance did not contain any regulation as to the manner of running cars or giving signals of their presence on the street by the sounding of bells or otherwise.

A motion for a nonsuit was made at the close of plaintiff's evidence, which was denied and the ruling duly excepted to. At the close of the evidence a motion on behalf

of defendant, for the direction of a verdict, was denied and the ruling excepted to. The cause was submitted to the jury for a special verdict under instructions to which many exceptions were taken which will be referred to in the opinion so far as necessary. The jury rendered the following verdict:

"*Q.* 1. Did the defendant, in the manner in which it operated the cars which collided with the wagon in which plaintiff was riding, fail to exercise the highest degree of skill and care to avoid a collision, which a careful and vigilant man would observe under like circumstances in the management of such business? *A.* Yes.

"*Q.* 2. If you answer the last question 'Yes,' then was such failure to exercise such skill and care, the proximate cause of plaintiff's injury? *A.* Yes.

"*Q.* 3. At what rate of speed was the car which collided with the wagon in which plaintiff was riding, traveling between Dewey and Farwell streets, at the time the motorman first applied the brakes? *A.* Ten miles per hour.

"*Q.* 4. Did the defendant run its car, at the time in question, between Dewey street and Farwell street, at a higher rate of speed than a prudent and vigilant person engaged in the management of such business, would have run it under the same circumstances? *A.* Yes.

"*Q.* 5. If you answer the last question 'Yes,' then was such rate of speed the proximate cause of plaintiff's injury? *A.* Yes.

"*Q.* 6. Was a bell rung continuously on the car which collided with said wagon while it was moving between Dewey and Farwell streets? *A.* No.

"*Q.* 7. Was the motorman of the defendant guilty of any want of ordinary care in the manner and extent he rang the bell? *A.* Yes.

"*Q.* 8. If you answer the last question 'Yes,' then was such want of ordinary care the proximate cause of the injury the plaintiff sustained? *A.* Yes.

"*Q.* 9. Was the plaintiff guilty of any want of ordinary care, at and prior to the collision, which contributed to the accident? *A.* No.

"*Q.* 10. If the plaintiff is entitled to recover, at what sum do you assess her damages? *A.* One thousand dollars."

On the coming in of such verdict defendant's counsel moved the court to strike out the answer to question 9 and insert in place thereof an affirmative answer, and for judgment on the verdict as so corrected, which motion was denied and the ruling duly excepted to. Other motions were made and exceptions to the rulings thereon preserved so as to present the questions involved on appeal. Judgment was rendered for plaintiff.

For the appellant there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *R. P. Wilcox*.

For the respondent there was a brief by *Thos. M. Casey* and *A. J. Sutherland*, and oral argument by *Mr. Sutherland*.

MARSHALL, J. The record discloses many reversible errors, most of which are violations of such plain and familiar principles of law, it is not considered that we would be justified in indulging in any very extensive discussion of them or citation of authorities. If the numerous decisions of this and other courts already in the books, on the points to which we refer, are not sufficient to prevent such obvious and plain departures from correct principles, as to some extent, at least, ruled this case in the trial court, perhaps it is useless to add to what has been said and is best to rely upon a mere correction of the errors and brief reference to elementary principles as the most effective way, in the particular jurisdiction involved, of preventing a recurrence of the mischief in the future. Trial courts must deal firmly and with courage in administering the great power intrusted to them. Established principles of law must prevail, regardless of the condition, and regardless of the station, of parties, natural or artificial. The most humble must have the full benefit of all the wise safeguards designed in the law for the preservation of personal and property rights, and the same benefits must be as fully vouchsafed to every other party. The famed patron of justice must be blind to mere

parties in actual as well as in theoretical administration, weighing facts, and them only, by those principles of right and justice, settled in the law, for separating right from wrong, denying redress in the particular case in hand, even though one party would be greatly benefited by an opposite conclusion while his adversary would not be perceptibly burdened thereby, wherever the violation of legal rights does not appear, which is the essential to support legal redress. Any other course would strike at the very foundation of the judicial system which is the embodiment of the wisdom of ages. If there is any class whose members have greater interest than any other in the maintenance of legal standards it is the most humble, the one whose members are the most defenseless, having little or no protection apart from the safeguards furnished by such standards, but who, with such safeguards properly administered, can attack or defy the most powerful in the vindication of their legal rights.

The evidence in this case leaves no room for reasonable doubt but that, as early as the first opportunity which plaintiff and her associates had for taking a fair observation to the east, as they approached the street-car track, and when, by their own evidence, they did take such observation — giving plaintiff the benefit of every reasonable if not possible inference from the testimony in her favor — there was a clear view of such track to the east for a distance of about 350 feet, and that the horses traveled thereafter, going at the rate of some three miles per hour or approximately four and one-half feet per second, about twenty feet, before they became so frightened by the noise or sight of the approaching car, which was only a very short distance away, and was approaching, according to the verdict of the jury, at a dangerous rate of speed or about eleven feet per second. So when full opportunity for observing the car existed, and plaintiff and her associates testified that they looked east, it

was not more than forty feet further away than when the horses became so frightened as to draw the attention of the driver to the danger, was a conspicious object, and not more than 100 feet from where the collision occurred. The idea that the car moved from a point where it was out of sight from plaintiff's point of view when she looked, to where it was when the horses became frightened, a distance of some 275 feet, while the horses traveled but about twenty feet, making the speed of the car somewhere about fifty miles per hour or twice as great as the most extravagant testimony of plaintiff's witnesses puts it, is as well within the bounds of the ridiculous, we venture to say, as anything that has heretofore received serious consideration by a trial court or jury. We cannot believe for a moment that the learned trial court or the jury believed that such a thing could be within reasonable probabilities or that the case was submitted to the jury upon any such theory.

So the case comes down to this: The car was in plain sight of plaintiff and her associates when she looked east. It was not more than about 100 feet away. It was not only within sight but it was strikingly so and was within hearing. The night being dark, the car an open one, with many electric lights and a headlight that sent its rays across the intersection of the streets some distance in advance, and it being on an up-grade from the crossing, it was necessarily a very conspicuous object from the point of observation at which, according to plaintiff's evidence, she looked east along the track. Under those circumstances is it reasonable to say that such care as was testified to by plaintiff and her associates, or any reasonable care, was exercised to discover the presence of the approaching car, and that the discovery was not made? To that there can be but one answer. Either the observation was not taken and the testimony to the contrary is false, or the car was seen and the testimony the other way was false, and the accident occurred by the driver

of the horses attempting to cross the track regardless of the danger, depending upon the vigilance of the motorman to stop his car before reaching the wagon. Any other answer would be contrary to all reasonable probabilities. This is one of those very plain cases sometimes met with, where clear improbability was brought within the limits of reasonable probability, as regards the situation of the jury, by the submission to them of the question involved. Its submission was necessarily a suggestion by the court that there was evidence to sustain plaintiff's theory upon some reasonable ground. That, to some extent, justified the jury in so treating the question, and in saying that to be a fact which all reason and common sense must condemn. The wrong thus done received such affirmance after its commission that the responsibility was cast upon this court to right it. As has heretofore been said, no greater injury can be inflicted upon a plaintiff in a case of this kind than to stimulate his hopes by a result, and cause him to exhaust his resources in defending such result, which is contrary to reason and cannot stand the test of a review. It should be kept clearly in mind that courts and juries go beyond their legitimate sphere by deciding that a fact exists which is contrary to all reasonable probabilities, and that such is the case no matter how many witnesses testify to the existence of such facts. The testimony of plaintiff that she looked for a coming car when it must have been plainly in view, yet did not see it, cannot be true consistent with possession by her at the time of the capacity for seeing, as to which there is no question. The point under discussion is ruled by *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378; *Steinhofel v. C., M. & St. P R. Co.* 92 Wis. 123; *Cawley v. La Crosse City R. Co.* 101 Wis. 145; *Flaherty v. Harrison*, 98 Wis. 559; *Badger v. Janesville C. Mills*, 95 Wis. 599; *Hyer v. Janesville*, 101 Wis. 371; *White v. C. & N. W. R. Co.* 102 Wis. 489–493; *O'Brien v. C., St. P., M. & O. R. Co.*

102 Wis. 628–633; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307–330; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, and many other cases.

It follows that,—since it must be conceded that it was the duty of the plaintiff, in the exercise of ordinary care for her own safety, to see the danger that was perfectly obvious by reasonable attention to the situation, and not go upon the track in front of the car that was so near that its speed would necessarily have to be greatly slackened or it would have to stop or render collision with the wagon probable,—she was guilty of contributory negligence as a matter of law, and the trial court should have so decided on the motion for a nonsuit, and should have so held at each subsequent occasion when the question was presented for decision.

What has been said, together with a conclusion reached which will preclude a retrial of this case, renders it unnecessary to deal with other errors; but it is considered that regard for the administration of the law in future cases justifies, if it does not call for, treatment of such errors to some extent.

In the first question the jury were asked to find whether the motorman exercised the highest degree of skill and care to avoid a collision which a careful, vigilant man would observe under like circumstances. In the instructions given as to such question the jury were informed in the main as follows:

"The language of the question itself involves what is held to be a degree of care which ought to be exercised by an electric railroad company in the management of its cars. It is the duty of a motorman on an electric car to exercise the highest degree of care to avoid any collision or accident, especially at street crossings."

There was more of the same sort. If the proposition thus given to the jury as the law governing the standard of care with which a street car should be operated, as regards the safety of travelers upon the street, has any support

worth mentioning in the authorities, we confess want of knowledge of it. No such authority is suggested by respondent's counsel and we venture to say that none exists. It is not improbable that the standard of care suggested by the learned circuit judge is the one that ought to prevail, but courts thus far have certainly not ventured to establish it so as to make it a rule of action. If established ever, since the law is now so firmly established to the contrary, it must be done by the legislature, not by the courts. A motorman circumstanced as the one in question was, or in any other case as regards persons upon the street, is bound to use ordinary care and nothing more,— such care as ordinarily prudent men, or such as the great mass of mankind, or such as a person of average prudence ordinarily exercises under the same or similar circumstances. We should say in passing that the multiplication of terms is only to cover the various ways in which the rule is generally stated. They are synonymous terms. The degree of care required in order to come up to the standard of ordinary care must be greater or less in one situation than in another according to whether the danger and the character of it, all things considered, are greater or less. As danger, or the degree of probability of injury therefrom, if it is not effectually guarded against, increases, necessarily the *quantum* of care should increase, but the standard by which it should be measured remains the same. It is the degree of care which a person of ordinary prudence ordinarily exercises under the same or similar circumstances. As is often stated (*Nass v. Schulz*, 105 Wis. 146), the rule in the abstract, as regards ordinary care, is such care as is ordinarily exercised by persons of average prudence. Such care relative to any particular state of facts requires the addition of the term "under the same or similar circumstances," because what may be considered ordinary care under one state of circumstances is by no means,necessarily,such care under different

circumstances. Both elements of the rule are significant. It is incorrectly stated as to any given case by the omission of either of such elements. No citation of authority, it seems, is required to support this doctrine. It is too familiar. The standard of care which the trial court said the conduct of the motorman should be tested by was entirely out of place in the case. The finding of fact on the subject was immaterial. It did not constitute a legitimate basis for any judgment against defendant. If defendant was guilty as found, no legal liability would follow, since there was no legal duty to exercise the high degree of care involved.

The next attempt in the verdict to submit to the jury an inquiry covering wrongful conduct constituting actionable negligence was in question 4, where they were required to find whether the car, at the time in question, was run at a higher rate of speed than a *prudent and vigilant* person engaged in the management of such business would have run it under the same circumstances. That inquiry was immaterial. No such standard of care was the proper test to be applied. All that has been said in respect to the first question applies to the fourth. The proper inquiry for submission to the jury, if any was necessary on the evidence,—which at least, it seems, is doubtful, since there was no controversy but that the car was stopped substantially at the place of the accident, without any injurious consequences to either the car or the wagon, indicating beyond controversy that the former was not much more than merely in motion at the time of the collision,—was whether the car was being run faster than a person of ordinary care would have run it under the same or similar circumstances. We may properly say in passing that the improbability, impossibility would be the better term, of an electric car, going several miles per hour on a down grade, colliding with a wagon and the car stopping substantially at the point of the collision without the persons on the car being materially

disturbed or the car showing any evidence of the occurrence other than a few scratches in the paint and without the wagon being thrown forward upon the track or broken or marred at the place of contact, did not seem to be appreciated in the submission of the case. Such circumstances so outweigh any amount of testimony, from the lips of witnesses, that the car was going many miles per hour at or about the instant of the collision, as to leave no room for such testimony to be true.

The third subject of supposed wrongful conduct was submitted to the jury by the sixth question, being the one as regards whether the bell on the car was rung continuously. That test of defendant's duty was supposed to be material by the regulation in the street-car franchise of 1888, which required a bell on each street car to be continuously rung when the car was in motion upon the street. There seem to be three reasons why the fact found by the jury in answer to the sixth question was immaterial: (1) If the regulation in the old street-car franchise was in force as an ordinance regulating the operation of cars, in the sense of being a general police regulation enacted by the city government — and we are unable to see any reason for that view,— it was void because it was unreasonable. (2) If such regulation was a condition of the grant of 1888 and as such binding upon the grantee, reasonable or unreasonable — since the grant was accepted with the condition — the binding effect thereof as regards the subject of negligence would still have to be tested by whether it was a reasonable regulation or not, as to promoting the safety of persons traveling upon the street. (3) Defendant, at the time of the accident, was operating its cars under an entirely independent franchise in which there was no provision as regards the ringing of bells upon its cars.

It is obvious that there was no intent, by the ordinance of 1897, to ingraft upon it the provisions of the ordinance of 1888.

The corporation that once possessed the grant of 1888 had practically gone out of existence, though the ordinance itself was still in existence as a property right, and stood in the way of granting a conflicting franchise. So it was made a condition of the new grant that it should not take effect unless the grantee was in fact the owner of the old franchise as such grantee was reputed to be. The new grant was broadly made, subject only to "the general provisions of the statute law, now in force and applicable thereto, and to such reasonable rules and regulations respecting such streets, highways and public ways and operation of cars as said common council may from time to time enact." It will be seen that the law made *in præsenti* a part of the grant was existing statutes of the state, not municipal ordinances, and that the language regarding regulations for the operation of cars was used prospectively. We are unable to find anything in the ordinance that requires or will permit a different construction to be put upon the language quoted than that which we have indicated. The reference to the old ordinance is in these words:

"This ordinance shall be void and of no effect unless said Chippewa Valley Electric Company is the owner by purchase, made under the authority of the circuit court of the United States of the Western district of Wisconsin or by other due and legal manner of the privileges, rights, and franchises existing by virtue of certain ordinances and of the ordinances heretofore adopted and passed by the common council of said city authorizing the construction of street railway and carriage ways in the city of Eau Claire."

There can be no reasonable doubt but a conflict of privileges, rights, and franchises was being guarded against, and that there was no other intent by the use of the quoted language. No necessity was left in the new grant for the exercise of any rights under the old one, for the former covered the whole field. It was new and original in every respect.

Though not necessary, it is deemed proper to discuss briefly

the first two propositions rendering the finding, as regards the failure of the motorman to ring the bell continuously, immaterial. It is elementary that the power of the city council to enact ordinances is not unlimited. It may go, within the field delegated to it by the state legislature, to the boundaries of reason. Within such field its discretionary power is supreme, but it cannot legitimately go beyond. If it does, in so far its enactments are void. Whether, in any given case where the facts are undisputed, a city council has exceeded its power by the enactment of an unreasonable ordinance, is purely a judicial question, to be considered substantially the same as that of whether the legislature has exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal power. *Clason v. Milwaukee*, 30 Wis. 316; *Barling v. West*, 29 Wis. 307; *Hayes v. Appleton*, 24 Wis. 542; 17 Am. & Eng. Ency. of Law (1st ed.), 247, and cases cited; 1 Beach, Pub. Corp. §§ 512, 513, 514; Elliott, Railroads, § 1082. Many cases will be found within the field covered by the above citations which in principle condemn an ordinance requiring a bell on a street car to be continuously sounded while the car is in motion upon a street. In *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, an ordinance prohibiting the use of a steam motor on street cars was held void. In *State v. Jersey City*, 27 N. J. Law, 497, an ordinance prohibiting a railroad train from obstructing a street more than two minutes at a time was so held. In *Delaware, L. & W. R. Co. v. East Orange*, 41 N. J. Law, 127, an ordinance compelling the maintenance of flagmen at grade crossings was likewise held void. In *Hayes v. Appleton*, this court, speaking by DIXON, C. J., said: "The power of a common council therefore extends only to the making of regulations for the good of the state. They must be such as only prudence and reason require, not unreasonably prejudicial to private rights and interests." Who can say that prudence and reason require that a bell shall be continuously sounded on a street car while it is in motion upon

the street? No one, we venture to say, who applies ordinary reason to matters of common knowledge. Common sense suggests that instead of operating to protect persons traveling upon the street it would have the opposite effect. It would tend to alarm horses not familiar with it; and persons would naturally become so familiarized with the sound that it would cease to attract attention. Without continuing the discussion, we venture to say that no good reason can be assigned for such a regulation in the operation of street railroads. The ground of the doctrine that the violation of an ordinance designed to promote the safety of individuals is negligence *per se*, is that it is a reasonable regulation to that end. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360. Hence it goes almost without saying that whether the violation of a regulation which is part of a granted franchise constitutes actionable negligence, must turn on the same principle. So it follows that the guilt of the defendant found in answer to the sixth question does not constitute actionable negligence and is insufficient to support a recovery in favor of plaintiff.

We have now, it seems, referred to every specific subject of supposed actionable negligence covered by the verdict. It was framed to answer the calls of the complaint, and the questions discussed, evidently, were deemed to be all that were necessary on the evidence, from the standpoint of the trial court and that of counsel for respondent. In that view there was nothing for the jury to pass upon. If there can be any doubt about the case as the trial court viewed it, from what has been said, it arises from the submission of the seventh question, which was immaterial if the ordinance requiring the continuous ringing of the bell was binding upon defendant. That question is as follows: "Was the motorman of the defendant guilty of any want of ordinary care in the manner and extent he rang the bell?" It seems that the requirement for the continuous ringing of a bell

not being binding on appellant, the question was immaterial, as it manifestly refers back to the one on that subject. The court charged with reference to it as follows:

"You should consider the ordinance making it the duty of the street-car company to ring a bell continuously. Of course you will have determined in answer to question No. 6 whether the bell was rung continuously or not, and if you find that the bell was not rung continuously while the car was in motion between Dewey and Farwell streets, then you will have to determine whether the fact proves that the motorman was guilty of any want of ordinary care in so omitting to ring the bell."

Obviously, if the requirements for the continuous ringing of the bell were valid — and it seems the learned circuit judge did not question that — it was not a matter for the jury to pass upon, whether the fact that there was a failure to perform that duty established want of ordinary care or not, because such failure of duty was negligence *per se*. If it was not a valid requirement,— and it was not, as we have seen,— there is nothing in the evidence suggesting the probability that ordinary care called for a continuous ringing of the bell. It was a clear, still night. There was no travel, to speak of, at the time. The time was such that much travel was not reasonably to be expected. It does not appear that there was any team upon the street other than the one in question. The conditions for seeing the street car for a great distance, by any person after reaching the line of Wisconsin street, were all favorable. The obstructions to the view, by a person approaching on the cross street, were not unusual. The track was somewhat on a down-grade but not unusually so,— not enough to materially interfere with the control of the car. The car itself was in perfect condition. If a jury could be permitted under such circumstances to say that ordinary care required the continuous ringing of a bell, they might do so in almost any case that is liable to arise. Nothing of the kind, we venture to say, has been

heretofore suggested in the law of negligence, as applicable to the operation of street cars.

There is another reason why the finding of the jury in answer to the seventh question is not sufficient to sustain the judgment, growing out of the erroneous instructions given in regard to it. The vice of the instruction as to the standard of care required of the motorman by the first question was carried forward into this and into all the intermediate questions. Such standard was many times stated as that of a prudent person under the circumstances, instead of a person of ordinary care. True, at one place in the instruction on the question under discussion the court said that the degree of care covered by it was that of an ordinarily careful and prudent person under the same or similar circumstances, but it had previously been said, in effect, that an ordinarily careful and prudent person, as regards the conduct of defendant, by its motorman on the occasion in question, was a person in the exercise of the "highest degree of skill and care,"—a person conducting himself up to the standard of "a careful and vigilant man" under the circumstances; that "of a prudent and vigilant person engaged in the management of the same business." At the particular point in question the subject was summed up thus: "You should consider these facts in determining whether the motorman was prudent and careful in ringing the bell." Manifestly that was all wrong. The jury should have been informed that they were required to determine from all the evidence bearing on the subject, whether the motorman exercised ordinary care,—such care as a person of ordinary care and prudence would ordinarily exercise under the same or similar circumstances. *Nass v. Schulz*, 105 Wis. 146; *Ward v. M. & St. P. R. Co.* 29 Wis. 144; *Wheeler v. Westport*, 30 Wis. 392; *Jung v. Stevens Point*, 74 Wis. 547; *Wall v. Highland*, 72 Wis. 435; *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109.

There are a large number of exceptions to the instructions given to the jury aside from those heretofore mentioned, some of which we will briefly consider. The following language was used as to question 1:

"The driver of a private vehicle may cross the track . . . if he uses due diligence not to interfere with the passage of a car. Between street crossings the cars have the right of way superior to that of other vehicles, to be exercised in a reasonably prudent manner; but this rule does not apply to the crossing of a track at a street crossing. There neither has the right superior to the other."

That doctrine has been fully considered and rejected by this and by most courts. *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593; *Watermolen v. Fox River E. R. & P. Co.*, *ante*, p. 153. It is difficult to conceive of a doctrine more promotive of mischief than the one embodied in the quoted language. If it were to prevail as a measure of the relative rights of a person operating a street car and a traveler upon the street, then each might run a race with the other and the one that arrived at the crossing first demand as a matter of right that his contestant give way for him to pass. Such a system would greatly interfere with the execution of the public purposes for which street-railway franchises are granted. It would, inevitably, greatly increase the number of accidents caused by cars in the street, which are now so numerous as to call strongly for methods of prevention rather than the adoption of judicial rules that will tend to greater confusion and danger, with consequent loss of life and property. Obviously, reasonable safety for travelers upon the streets as well as for patrons of street cars, and reasonable safety for persons performing the important duties of operating street cars as well, and reasonable execution of the purpose for which such cars are operated, require that, when a car is operated reasonably, that is, in such a way as to give reasonable notice of its approach to a street crossing and reasonable opportunity for travelers upon the street to keep

out of its pathway, the motorman exercising ordinary care to control the movement of the car so as not to run into a person who may inadvertently get in its way, it shall have the right of way over a traveler with a vehicle or otherwise, wishing to cross the track at that point; that such traveler shall not have the same right to make the motorman stop the car to allow him to pass as the motorman has to cause him to stop to allow the car to pass; that such traveler shall not have the right to go upon the track in the circumstances stated in front of a moving car, when there is reasonable ground to believe that so doing will require the speed of the car to be slackened in order to avoid collision. That is the reasonable, humane doctrine, it is believed. There must be some regulation in such cases, whereby one right is primary and the other subordinate. By universal custom, that is recognized in the use of streets by ordinary travelers passing in different directions; and the statutory regulation requiring travelers, when meeting upon the highway, to turn to the right, is on the same theory. Sec. 1591, Stats. 1898. The policy of the law is settled that way generally, where there would otherwise be conflicting rights on public ways, for the purpose of obtaining the best standard for peace and safety, as for example, the relation of a railway company with the public (Elliott, Railroads, § 1153; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418), and the relative rights and responsibilities of towns where a highway from one town to the adjoining town crosses a town line road (*State v. Childs*, 109 Wis. 233). There are cases holding to the contrary, but they are mostly if not exclusively cases decided in inferior jurisdictions. They proceed to a conclusion upon the dangerous theory of a conflict of rights between those operating street cars and travelers upon the streets, in which the courts must take sides one way at one time and another way on a different occasion, according to the circumstances of the particular case. They proceed, also,

misconceiving the scope of street-car franchises and the power of municipalities over public streets. Streets are under the control of appropriate legislative agencies to be used in such reasonable ways as such agencies may determine in furtherance of the original design thereof. That includes power to grant street-car franchises with such limitations as regards the operation of cars or otherwise as may be deemed best for the public interests. When such a franchise is granted without limitations as to the operation of cars at crossings there passes with the grant all reasonable liberty of action necessary to effectually execute the purpose of the grant,— furnishing to the public facilities for quickly moving from place to place upon the street; and by implication other rights, so far as not unreasonably affected, are made subordinate. That requires travelers upon the street to give way for the passage of cars at street crossings, as before indicated, the same as at other points, though not to the same degree.

The following and similar language was used in the court's instructions: "The defendant company was bound to exercise its rights with the proper regard to the rights of others." "The motorman was bound to exercise a proper degree of care," etc. Such expressions were misleading and confusing. To say that a motorman was bound to exercise a proper degree of care is right in the abstract, but it fails to convey any information as to what is a proper degree of care. Without some explanation it would be no guide whatever but would leave the jury free to set up their own standard. Taken in consideration with the instructions to which the expressions manifestly referred — that the defendant and the motorman owed plaintiff the duty of exercising the highest degree of care, the care of a vigilant and prudent person in the same business under the same circumstances — they were clearly wrong, as we have before indicated.

This instruction was given:

"It is negligence on the part of a street-railway corporation to propel its cars at such a high rate of speed as to endanger the safety of persons attempting to drive onto or across the street."

The idea in that seems to be the same as in the instructions to the effect that a traveler on the street with a vehicle has the same right to compel the motorman to give way to allow him to cross as the motorman has to delay the traveler. The mere statement of the matter is sufficient to condemn it. It entirely ignored the true relations between the users of the space occupied by the street,—that one is the common right and the other the special right. The duty of the traveler to exercise ordinary care was ignored, and the mere fact of a car being operated so that a traveler cannot pass in front of it without danger was made negligence *per se*, regardless of whether the motorman was exercising ordinary care in his situation or not. It admitted readily of the meaning that a motorman must keep his car so under control that in case a person drives in front of it he can stop it before a collision can occur, and that if he does not he is guilty of actionable negligence.

The jury were instructed, in substance, not only that there was an ordinance in force in the city of Eau Claire limiting the right of defendant as to the speed of its cars to ten miles per hour and requiring the bell to be rung on each car continuously while in operation upon the street, but that if a violation of such ordinance was found by the jury it was still a question of fact to be determine by them whether such violation constituted a breach of duty as regards travelers upon the street. The subject covered by such instructions has been heretofore referred to in discussing the questions. It was error to hold that there was an ordinance governing the rights of defendant in the matters referred to. If there was such an ordinance and it was

valid, it was error to leave the question to the jury to say whether a violation thereof constituted negligence. The authorities are in substantial harmony that the violation of such a regulation is at least *prima facie* negligence, and this court, with many others, holds that it is negligence as a matter of law. *McCall v. Chamberlain*, 13 Wis. 637; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360; *Toutloff v. Green Bay*, 91 Wis. 490; *Klatt v. N. C. Foster L. Co.* 97 Wis. 641; Elliott, Railroads, §§ 711, 1095.

We have referred to that element of the instructions as regards the effect of a violation of the ordinance, assuming that it was a valid regulation, because the exceptions seem to cover that field sufficiently to raise the question discussed. While that part of the charge was erroneous, it manifestly was not prejudicial to defendant. The only error which in any event could have been prejudicial to it was in the erroneous statement to the jury that there was in existence a valid ordinance on the subject referred to.

What has been said covers with sufficient particularity the entire field of errors discussed in the briefs of counsel, so far as the points are deemed material to this case, or should be treated in the case, whether necessary or not, as a help in future litigation. We will recapitulate the points decided for the purpose of definiteness and the benefit of greater facility for ready reference.

1. It is not actionable negligence for the motorman in charge of a street car, when the car is in operation upon a street and approaching a street crossing, to fail to exercise the highest degree of care, or such care as a vigilant or prudent person would exercise under the same or similar circumstances. It is sufficient if he exercises the care of a person of average prudence in the same or similar circumstances.

2. An instruction that a person in the circumstances above indicated must exercise due care or proper care, unexplained,

fails to instruct and may mislead. Coupled with instructions to the effect that the term refers to the highest degree of care or any degree of care other than that of a person of average prudence under like or similar circumstances, it is error.

3. The mere acquirement by purchase of a street-car franchise containing regulations as to the manner of operating cars, as a condition of a new and independent grant which does not refer to or in any way make the provisions of the old grant a part of the new one, such condition being clearly imposed to prevent a conflict of rights, does not add to or restrict the provisions of such new grant.

4. A city ordinance is not valid unless reasonable, and whether it satisfies that requirement or not is a judicial question.

5. A city ordinance requiring the continuous ringing of a bell upon a street car while such car is in motion upon a street is unreasonable and to that extent void for any purpose, unless made a condition of the grant.

6. If a requirement of the character above indicated is valid for any purpose because made a condition of the grant itself, the violation thereof does not constitute actionable negligence or evidence of such negligence, because, as regards the safety of travelers on the street, it is unreasonable.

7. As a rule the mere operation of a street car so as to render it dangerous for a person to cross the street in front of it is not negligence.

8. A traveler upon a street at a street crossing, desiring to cross the street-car track there situate, has not the same right to require the speed of a car to be slackened to enable him to pass over the track as the person in charge of the car has to require him to give way to allow the car to pass.

9. The motorman in charge of a street car approaching a street crossing must use ordinary care for the safety of

travelers liable to get into the pathway of the car, but he has the right to expect that such travelers will use ordinary care to inform themselves of the approach of the car and not to retard its passage.

10. It being the duty of the traveler upon the street, in approaching a point where he desires to cross a street-car track, to look and listen for a coming car and to perform that duty when and where he will have reasonable opportunity to render his efforts in that regard effective, it is as much his duty as a matter of law to see an approaching car which is in plain sight and in dangerous proximity to the crossing, and not to negligently place himself in the way of it, as it is to look for the car; and evidence that he performed the duty of looking but did not see the coming car does not raise a question of fact for a jury to determine.

11. It being undisputed that an alleged collision between a street car and a wagon that was suddenly drawn upon the track in front of a car at a street crossing did not result in any injury to the car other than a few scratches of the paint on the front end, nor disturbance of lights upon the car, the persons in charge thereof, or the passengers thereon, other than that caused by sudden application of the brake and reversal of the current; that the car stopped substantially at the place of the collision; and that it did not materially push the wagon ahead upon the track nor mar nor break it at the point of contact, such physical situation is so inconsistent with the theory that the car was going several miles per hour, for the few seconds required for a traveler, approaching a crossing at a speed of three miles per hour, to travel thirty feet, as to leave no ground for the jury to say that the mere speed of the car was so great as to constitute actionable negligence.

12. Testimony of a person or any number of persons that he or they, when approaching a street-car track with a view of crossing it, looked along the track for a coming car and

did not see one, though a car was in plain sight and so near the point of observation as to render an attempt to cross the track in front of it dangerous, is inconsistent with all reasonable probabilities and a jury should not be required or allowed to consider the subject as involving a disputable question of fact.

It is contended by appellant's counsel that the motion to change the answer of the jury on the subject of contributory negligence of plaintiff, covered by the ninth question, to the affirmative, and for judgment, should have been granted; and with that, it must follow from what has been said, we agree. It follows further, under the rule governing the subject, that appellant is entitled to have done that which ought to have been done by a judgment here remanding the cause upon reversal with directions to the trial court to correct the verdict as indicated and render judgment for defendant. *Menominee River S. & D. Co. v. M. & N. R. Co.* 91 Wis. 447, 457; *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis. 243; *Keller v. Schmidt*, 104 Wis. 596.

By the Court.—The judgment appealed from is reversed. The cause is remanded to the circuit court with directions to correct the verdict by changing the answer to the ninth question from "No" to "Yes" so as, in form, to find the plaintiff guilty of contributory negligence in accordance with the facts, and to render judgment on the verdict as so corrected in favor of defendant for costs.

WARDER, BUSHNELL & GLESSNER COMPANY, Appellant, vs. PISCHER, Respondent.

April 11 — April 30, 1901.

Sales of chattels: Contracts: Rescission: Return of chattels: Parol modification: Instructions to jury: Prejudicial error: Agency: Warranty: Authority.

1. In an action to recover the purchase price of a binder sold under a warranty, it appeared, without dispute, that the purchaser returned the machine to the vendor's agent under a claim of rescission of the contract on the ground that it failed to comply with the warranty, but whether such agent accepted the return without protest was in dispute. *Held*, that the question whether the return had been so accepted as to constitute a complete rescission of the contract was material and should have been submitted to the jury.
2. Where the defendant in such a case claimed a parol modification of the contract by plaintiff's agent, the submission to the jury of the question whether there had been such a modification, under instructions that if they found that a certain conversation, claimed to embody such parol modification, was had, and that it occurred by some clear space of time after the signing of the contract, then they should answer the question in the affirmative, is *held* prejudicial to plaintiff. The jury should have been instructed that the question for them to determine was whether the minds of the parties meet, and it was thereby mutually understood that the original contract should be changed in the particulars alleged.
3. Where plaintiff's agent, authorized to make sale of its machines, sold a binder to defendant, agreeing that he might try it, and if he was not satisfied return it, thereby varying the terms of the written order therefor, such change does not affect the warranty of the machine, and does not go beyond the agent's authority, there being nothing in the written order limiting his authority in that regard.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

This action was commenced in justice's court. The complaint shows that on August 4, 1899, plaintiff sold the de-

fendant a binder upon a written order; the price to be $110, with six per cent. interest. A note for the amount was to be given on demand, after receipt of the machine, payable November 1, 1900. One of the conditions of the sale was that if, upon one day's trial, the machine did not work well, the defendant was to give plaintiff or its agent immediate notice, and allow time to send a person to put it in order. If it could not be made to work well, then defendant was to return it at once to the agent from whom he received it. The machine was delivered, and, after trying it one day, defendant notified the plaintiff's agent that it did not work well. Plaintiff sent an agent, and put the machine in order and made it work well. Thereafter plaintiff demanded notes for the purchase price, which defendant refused to give. The answer admitted giving the order, and the receipt of the machine, and alleged that it did not work well the first day, notice was given to the agent, and an attempt made to remedy the defects; that the machine did not work well, and was returned to plaintiff's agent. Upon the trial in circuit court, and after the evidence was all in, the defendant was permitted to amend his answer by setting out that, after the execution of the written order for the machine, the order was modified by parol to the effect that defendant was to be judge of whether the machine worked well, and, if it did not work to his satisfaction, it might be returned, and the written order would be of no force.

A special verdict was rendered as follows:

"*Q.* 1. Did the machine work well upon the first day's trial? *A.* Yes.

"*Q.* 2. After the plaintiff's agents went out on Monday afternoon to put the machine in order, was the machine made to work well? *A.* No.

"*Q.* 3. Did the defendant on Thursday, August 8th — the next day after plaintiff's agents were out to make the machine work well,— return the machine to Barton, plaintiff's agent, claiming to rescind the contract of sale because the

machine did not work well? *A.* (*By order of the court.*) Yes.

"*Q.* 4. Did Barton, plaintiff's agent, after the written order was signed for the machine, agree with defendant that defendant might take the machine home and try it, and, if he was not satisfied, bring it back, and it would not be a trade? *A.* Yes.

"*Q.* 5. Did the defendant, after such trial, bring the machine back, because he was dissatisfied with it, and claim to rescind the contract on that account? *A.* (*By direction of the court.*) Yes.

"*Q.* 6. In case the court decides that the plaintiff is entitled to recover, at what sum do you assess its damages? *A.* (*By direction of the court.*) $110.00."

With reference to the fourth question the court gave the following instructions:

"Mr. Barton at first testified as follows: '*Q.* Mr. Barton, didn't you, after this contract was signed, and before the binder was loaded onto *Mr. Pischer's* wagon, didn't you say to him this: "Take this machine home and try it, and, if you are not satisfied, bring it back, and it is not a trade"? *A.* Yes, sir; he was to have one day's trial.' Mr. Barton, on being recalled in rebuttal, states that he is mistaken in saying that this occurred after the signing of the order. He now claims that the conversation on this subject took place before the order was signed. The defendant states that after the binder was loaded, and after he had signed the order, the following conversation occurred between him and Mr. Barton: 'Before I started I said to Mr. Barton: "I will take this machine home now, and, if this machine satisfies me, then it will be a bargain." "All right," he said: "if it don't work well and don't satisfy you, bring it back; yes."' Now, if you find that such conversation actually occurred before the signing of the order, and not after, I will instruct you to answer this question, 'No.' Your answer should be in the negative unless you find that there was such a conversation "after" the signing of the order. If you find there was a conversation of the purport involved in the question which I have submitted, after the signing of the order, and separated from such signing by some clear space of time, then you may answer this question in the affirmative."

Plaintiff moved to strike out the answer to question 4 and for judgment. This motion was denied, and judgment was entered for defendant, from which this appeal is taken by plaintiff.

L. M. Sturdevant, for the appellant.

For the respondent there was a brief by *Marsh & Tucker*, and oral argument by *S. M. Marsh.*

BARDEEN, J. The result reached on the trial of this case shows a somewhat curious complication of affairs. The plaintiff bases its right to a recovery upon the claim that it sold the binder upon the conditions set out in the statement, and that after it had been tried, and notice given that it did not work well, an agent was sent, who put it in order and made it work in full compliance with the contract. Upon proof of these facts, and that defendant refused to pay for the machine, the plaintiff had a right to recover damages for refusal of defendant to give the note as agreed, unless it was to show that the machine did not comply with the warranty, and that the defendant had effectually rescinded the contract, or that the machine was worthless. *Peerless R. Co. v. Conway*, 79 Wis. 622. Such damages would ordinarily be the purchase price agreed to be paid. But the undisputed proof shows that the machine was returned to plaintiff under a claim of a rescission of the contract, and that it was taken possession of and tested by plaintiff's agents. Of course, if it was accepted by them without protest, this was a complete rescission of the contract, and plaintiff would have no right of action. The evidence is not entirely clear on the subject, and no issue was submitted to the jury that called upon them to determine the question. It was clearly in the case, and ought to have been determined. To further complicate the case, the court submitted to the jury the question of whether the machine "worked well" upon the first day's trial. This was not

claimed by the pleadings on either side, although the evidence amply sustains the finding of the jury that it did. So long as the plaintiff did not base its right of recovery upon that fact, we see no reason why it was submitted to the jury.

In answer to the fourth question, the jury found that, after the written order for the machine had been signed, plaintiff's agent agreed that defendant might take the machine home and try it, and if he was not satisfied he might bring it back, and it would be no trade. This was based upon a claim by defendant that, after the machine had been loaded and the order had been signed, he had a conversation with the agent substantially as detailed in the court's instructions. This was claimed by defendant to be a parol modification of the written agreement, and gave the defendant a right to return the machine if for any reason he was not satisfied with it, regardless of its working qualities. The finding of the jury is attacked as being against the weight of the evidence. This claim finds considerable support in the fact that no such claim was made on the trial in justice's court, and that the defendant then swore that he was standing on the original contract, and so notified the plaintiff's agents. The parol modification seems to have been an afterthought developed some time after the second trial had begun. It is contrary to all the reasonable probabilities in the case, and finds but scanty support in defendant's own testimony, when it is considered as a whole. The serious error in the case arises from the manner in which the question was submitted to the jury. As indicated in the statement, the court told the jury, after detailing the conversations between the agent and defendant, that if they found there was a conversation of the purport involved in the question submitted, and it occurred by some clear space of time after the signing of the order, then they should answer the question in the affirmative. The vice of this

instruction arises from the fact that the court bases the right to answer it upon a determination of the question of whether a given conversation occurred. The real question was whether the minds of the parties met, and it was mutually understood that the original contract should be changed in the particulars mentioned. That question was not submitted to the jury by the charge given, and hence constitutes prejudicial error. For all that appears in the case, this might have been mere loose talk of the agent relative to his understanding of the terms of the original contract. Solemn written contracts cannot be brushed aside by mere casual conversations. The minds of the parties must meet, and the terms of the new agreement be established with the same certainty that is required of other contracts, or it will not be recognized.

The plaintiff raises a further question as to the authority of the agent to alter or vary the terms of the written order. It is argued that the change claimed relates to the warranty of the machine, which the agent had no authority to alter. No notice of limitations upon the agent's authority was brought home to defendant. Within the rule stated in *Bannon v. C. Aultman & Co.* 80 Wis. 307, we hold that the agent did not go beyond his authority in the matter complained of. There is nothing in the written order limiting such authority. The alleged change did not affect the warranty of the machine. If made, it simply gave the defendant the right to say whether the machine suited him or not. It might have filled the warranty in every respect, and yet not have been satisfactory to defendant.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial.

THE STATE EX REL. GIROUX, Respondent, vs. LIEN, City Clerk, Appellant.

April 11—April 30, 1901.

Appeal: Jurisdiction: Record: Dismissal.

Where the judgment appealed from is not included in the record, nor returned to the supreme court from the court below, the appellate court has no jurisdiction and the appeal must be dismissed.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Appeal dismissed.*

Appeal by respondent below from judgment on writ of *certiorari* reversing certain action of the board of review of the city of Black River Falls.

Carl C. Pope, for the appellant.

For the respondent there was a brief by *Lamb, Richmond & Lamb*, and oral argument by *T. C. Richmond.*

DODGE, J. The judgment appealed from is not included in the record nor returned to us from the court below. In its absence we have no jurisdiction of an appeal therefrom. *Barton v. Twohy M. Co.* 104 Wis. 420.

By the Court.—Appeal dismissed.

ROBINSON, Respondent, vs. EAU CLAIRE BOOK & STATIONERY COMPANY and another, Appellants.

April 12—April 30, 1901.

Libel: Pleading: Amendments after trial: Words actionable per se: *Instructions to jury: Justification: Evidence: Damages: Court and jury.*

1. Plaintiff was soliciting subscriptions for a directory he contemplated publishing, when there appeared in two newspapers an article headed "A Warning," copies of which in the shape of a circular

letter were mailed by defendants to several of their customers. In an action for libel, the article, as set forth in the complaint, was to the effect that "certain unscrupulous parties, in making a pretended canvass of the city for a directory, persist in falsely representing" that defendants did "not intend to publish a directory;" that "these untruthful adventurers" knew it was possible for them to secure business *only* by "misrepresentation"; that the people of the city had had experience with "wandering fakirs whose whole capital" was "glowing promises and only object to capture money," and that it was "folly to pay money to irresponsible directory schemers." No objection was made that the complaint failed to allege that the article was published concerning the plaintiff, as prescribed by sec. 2677, Stats. 1898. *Held*, that the circuit court, after trial, properly allowed the complaint to be amended in that regard.

2. Such article was libelous *per se*, although it did not impute a crime, since it directly tended to prejudice the plaintiff in his trade and business.

3. In such case, it was error to instruct the jury to the effect that the defendants would fail on their plea of justification, even if they had proved that the plaintiff had falsely and untruthfully made the statements charged in the libel, unless they went further, and also proved that at the time of making such statements the plaintiff knew "that the defendants did not intend to issue a directory."

4. In such case, evidence of the amount of money invested in plaintiff's business and the receipts arising from his sales; of the amount he expended for board while collecting pay for books delivered; and that plaintiff's directory is copyrighted, is irrelevant and its admission improper.

5. In such case, where the answer admitted mailing copies of the article in question to certain of defendants' customers, but denied that it caused the publication thereof in one of the newspapers, evidence of one of the proprietors of the newspaper that he knew they had some authority to publish the article; that he did not know how they received it, nor who directed them to put it in the paper; and that the defendants might have done so, but he could not remember, is not sufficient to take to the jury the question whether defendants caused such publication.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

For the respondent there was a brief by *Teall, Thomas & Teall*, and oral argument by *F. C. Teall.*

CASSODAY, C. J. The complaint alleges: That in 1899 the plaintiff was engaged in publishing a directory of the city of Eau Claire. That in February, 1899, the defendants published in two certain newspapers and in a circular letter a certain article alleged to be false and defamatory, headed "A Warning," to the effect that "certain unscrupulous parties, in making a pretended canvass of the city for a directory, persist in falsely representing" that the defendant company did "not intend to publish a directory;" that "these untruthful adventurers" knew full well that it was possible for them to secure business *only* on the basis of "misrepresentation;" that the defendants had repeatedly assured the public, through the press and otherwise, that they should continue to publish the city directory, and that their new volumes would be ready about the 1st day of the next July, after the annual moving season; that the people of the city had experience with "wandering fakirs, whose only capital" was "glowing promises, and only object to capture their money;" that the people wanted the best directory, and that that would be the one issued by them; that it was "folly to pay money to irresponsible directory schemers," when they could be sure of a reliable work at the same or less cost. The complaint further alleges that on or about February 20, 1899, and upon divers days subsequent thereto, the defendants, for the purpose of injuring the plaintiff in his said business, and to discourage prospective subscribers to his directory, and to injure the plaintiff in his business and good name, falsely, wrongfully, and maliciously composed and caused to be published in the "Leader" and "Telegram," newspapers of general circulation and published at the city of Eau Claire, the false and defamatory article mentioned, and claimed $5,000 damages.

Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff, and assessed his damages at $1,500. On motion of the defendants the court set aside the verdict and granted a new trial, with an option on the part of the plaintiff to remit one half of the verdict, and take judgment for $750 damages and costs, which he did. From the judgment entered thereon for such reduced amount and costs, the defendants bring this appeal.

On the motion for a new trial it was suggested that the complaint failed to allege that the article was published concerning the plaintiff, as prescribed by the statute (sec. 2677, Stats. 1898). But in view of what was alleged, as stated, and that no such objection had been made upon the trial, the trial court very properly allowed the complaint to be amended in that regard.

Within the rules of law so frequently announced by this court as not to require repetition, we must hold that a number of the expressions in the article were libelous *per se*. *Bradley v. Cramer*, 59 Wis. 309; *Street v. Johnson*, 80 Wis. 455; *Buckstaff v. Vaill*, 84 Wis. 129; *Smith v. Utley*, 92 Wis. 133; *Monson v. Lathrop*, 96 Wis. 386; *Candrian v. Miller*, 98 Wis. 167. The article published directly tended to prejudice the plaintiff in his trade and business, and in that respect was actionable, without imputing crime. *Singer v. Bender*, 64 Wis. 169; *Brown v. Vannaman*, 85 Wis. 454, and cases there cited; *Smith v. Utley*, 92 Wis. 136; *Dr. Shoop F. M. Co. v. Wernich*, 95 Wis. 168. While the defendants were at liberty to inform the people of the city that they intended to publish a city directory, any representations to the contrary notwithstanding, yet that did not give them the privilege to publish an article tending to impugn the integrity, the truthfulness, and the honesty of the plaintiff in his trade and business. Such an article published under such circumstances is not privileged. *Rude v. Nass*, 79 Wis. 321; *Brown v. Vannaman*, 85 Wis. 451; *Werner v. Ascher*, 86 Wis. 349.

The industrious counsel for the defendants have taken fifty exceptions to the charge. Some of them are covered by what has been said. Another exception is to a portion of the charge to the effect that the defendants would fail on their plea of justification even if they had proved that the plaintiff had falsely and untruthfully made the statements charged in the libel, unless they went further, and also proved that at the time of making such statements the plaintiff knew "that the defendant company did not intend to issue a directory." This was going further than the statute required. Sec. 2678, Stats. 1898.

The trial court regarded the damages assessed by the jury as excessive, and so compelled the plaintiff to reduce the same one half, or submit to a new trial. Such excessive verdict was the manifest result of admitting a mass of irrelevant and improper testimony. All of such evidence was not objected to, but some of it was. While the publisher of a libel which injures a man's trade and business may be liable for the damages thereby directly caused, yet it does not follow that the difference between the amount of money invested in the business, which the plaintiff in his testimony denominated as his expenses, and the receipts arising from his sales, constituted the true measure of such damages. Serious loss in conducting a new enterprise or business often occurs without the publication of any libel,— especially with an established local competitor in the field. Here the plaintiff's directory books were ready for delivery May 16, 1899; and, to make up the amount of expenses so claimed, the plaintiff included $360 for board from that time to the following September, during which time he was collecting pay for such books delivered. We are unable to perceive how such board bill can be regarded as the direct result of the publication of the libel. Evidence was received, against objection, as to the wealth of the defendant company. At the close of the testimony it was stricken out, but it obvi-

ously had influence with the jury. We perceive no ground for admitting evidence that the plaintiff's directory had been copyrighted. This is an action of libel, and not for infringing a copyright.

The answer admits that the defendants mailed copies of the article in question to certain of their customers, but expressly denies that they caused the publication of the libel in the Leader or the Telegram. Without proving that the defendants, or either of them, caused such publication in either of those papers, the court admitted evidence, against objection, that the libelous article was published twice in February, 1899, in the Eau Claire Telegram, and once in the Eau Claire Leader. The court charged the jury that it had not been proved that the defendants caused the publication in the Telegram, and that no damages should be assessed on that publication, but submitted to the jury the question whether they caused such publication in the Leader. The only evidence tending to prove such publication is the testimony of one of the proprietors and editors of the Leader to the effect that he knew they had some authority to publish the article; that they made no charge for such publication, and were not paid for it; that they were supposed to give all the information and news about the directory; that it was left to their will and discretion as to how much or how little they would say; that he could not remember how they received the article, nor who directed them to put it in the paper; that the defendants might have done so, but he could not remember. We do not think such evidence was sufficient to take the case to the jury on that question,—especially against the flat denial on the part of the defendants.

We do not deem it necessary to further consider the numerous exceptions and objections taken by counsel.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

STANNARD and another, Respondents, vs. YOUMANS, Garnishee, Appellant.

April 12 — April 30, 1901.

Garnishment: Appeal: Disposal of property: Construction of mandate: New trial.

1. The discharge of a garnishee by a court of competent jurisdiction releases the equitable lien created by the garnishment, and protects the garnishee in disposing of the property in his hands after such judgment and prior to its reversal upon appeal, unless the lien be continued by proper order or stay of proceedings pending the appeal.
2. On appeal a judgment discharging a garnishee was reversed with directions to charge the garnishee and for further proceedings according to law. *Held*, that such mandate contemplated a new trial, and that the garnishee be charged with such liability as might be developed upon such trial by the application of correct legal principles to the facts established by the evidence.

APPEAL from a judgment of the circuit court for Clark county: A. J. VINJE, Judge. *Reversed.*

This was a garnishee action. The garnishee was an assignee under a voluntary assignment for the benefit of creditors, executed by one Manes. The plaintiffs, who were creditors of Manes, sued him, and recovered judgment upon their claim, and garnished the defendant, claiming that the voluntary assignment was void because of an omission in the assignee's bond. Upon the first trial of the garnishment action in the circuit court the garnishee was discharged, but upon appeal to this court that judgment was reversed, and the case was remanded, with directions to charge the garnishee, and for further proceedings according to law. 100 Wis. 275. Upon return of the record to the circuit court the defendant was allowed to file a supplemental answer stating, in substance, that the first judgment in the circuit court was rendered at the October term, 1896; that no ap-

peal was taken therefrom until October, 1897, and that the hearing upon such appeal took place at the January term, 1898; that the property in the hands of the garnishee received under his assignment consisted of certain logs and piling, together with a number of cows and horses, the nominal value of which at the time of the assignment was fixed at $800; that the actual cash value of the same was much less than $800, but that of such property all except 5,200 feet of piling and one black mare four years old, were sold by the defendant subsequent to the first judgment in the circuit court, and prior to the appeal, for the aggregate sum of $293.87; that prior to the reversal of the case in this court the defendant had paid out for necessary expenses and costs of the assignment $207.75, and after such reversal had also paid out $75, being the taxed costs upon such appeal, leaving in his hands $11.12 in cash; and that there were also in his hands, undisposed of, the 5,200 feet of piling and the black mare. Wherefore the garnishee prayed that he be held responsible only for the property which was in his hands at the time of such reversal.

The facts stated in the supplemental answer were not denied at the trial, but were, in substance, admitted, and no evidence was interposed except the affidavit of Mr. Sturdevant, plaintiffs' attorney, showing, among other things, that the property assigned to the defendant was of the value of upward of $800. The plaintiffs elected to take a personal judgment against the defendant for the amount of the judgment in the main action, being the sum of $639.16, and such judgment, with costs, was rendered, and the defendant appeals.

For the appellant there was a brief by *S. M. Marsh*, attorney, and *James Wickham*, of counsel, and oral argument by *Mr. Wickham*.

For the respondents the cause was submitted on the brief of *L. M. Sturdevant* and *R. F. Kountz*.

WINSLOW, J. It is quite well settled that the discharge of a garnishee by a court of competent jurisdiction releases the equitable lien created by the garnishment, and protects the garnishee in disposing of the property in his hands after such judgment and prior to its reversal upon appeal, unless the lien be continued by proper order or stay of proceedings pending the appeal. Rood, Garnishment, § 215; *Maxwell v. Bank of New Richmond*, 101 Wis. 286. In case there has been no such stay, and the garnishee has disposed of the property sought to be reached prior to the reversal, he should be allowed upon new trial to plead such disposition as a defense. *Maxwell v. Bank of New Richmond, supra.*

Hence, in the present case, it being admitted that the garnishee had disposed of the property sought to be reached after the judgment discharging him, and in reliance thereon, and prior to the judgment of reversal, he should only have been charged as garnishee with the property which still remained in his hands at the time of the reversal or its value.

It seems probable that the circuit court construed the mandate of this court upon the first appeal as an absolute direction that judgment be entered for the property in the hands of the garnishee at the time the action was commenced, and it must be conceded that the mandate was unfortunately worded. It did not, however, direct the entry of any specified judgment, but that further proceedings be had, and that the garnishee be charged. It evidently contemplated a new trial, and necessarily, also, that the garnishee be charged with such liability as might be developed upon such trial by the application of correct legal principles to the facts established by the evidence.

By the Court.—Judgment reversed, and action remanded for a new trial.

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POST, Respondent, vs. CAMPBELL, Appellant.

April 12 — April 30, 1901.

Equity: Title to land: Pleadings: Amendment: Demurrer ore tenus: Remedy at law: Misconduct barring relief: Life estate coupled with power: Inconsistent limitation.

1. In an action to remove a cloud on the title to real estate, the complaint alleged that defendant claimed the land under a deed from plaintiff's ancestor, which was invalid because never delivered, and that he had wrongfully obtained possession thereof. On the trial, the court permitted the complaint to be amended so as to allege that the plaintiff's father conveyed the land to her mother under an agreement that the mother was to have only a life estate therein, and that the property was to pass to the plaintiff on her death; that the defendant unduly influenced the mother to execute a deed to him, which was never delivered, but was wrongfully obtained by defendant; and that defendant was in possession under said deed, claiming title to the land. *Held*, not a substantial change in the plaintiff's claim within the meaning of sec. 2830, Stats. 1898, authorizing such amendments.
2. The substantial change in the "claim," as the term is used in said statute, only stops short of changing one cause of action for another, as the substitution of a cause of action in equity for one at law, or one sounding in tort for one on contract.
3. In such case an objection to any evidence under the amended complaint, because it failed to state facts constituting a cause of action in equity, was properly overruled, although the complaint showed that plaintiff was out of possession, it being impossible for her to recover without proving, *aliunde* the record, the invalidity of defendant's deed.
4. In a suit in equity to remove a cloud from the title to the plaintiff's lands, a demurrer *ore tenus*, that the complaint fails to state facts constituting a cause of action in equity, is not sufficient to raise the objection that plaintiff has an adequate remedy at law. Such objection is waived by the failure to enter formal demurrer to the complaint on that specific ground.
5. The doctrine that he who comes into equity must come with clean hands applies where the plaintiff has been guilty of some conduct contrary to good conscience in respect to the subject of the litigation or some matter connected therewith and affected thereby; thus

where a husband conveys property to his wife under an oral agreement that the wife is to have only a life estate, and that the remainder is to go to his daughter, and the wife after his death remarries, the fact that the daughter fails to render aid to her mother when sick is not such inequitable conduct on her part as will prevent the daughter from maintaining a suit in equity to establish her right to the land as against the second husband, to whom the wife had attempted to convey the fee.

6. An agreement between a husband and wife whereby he conveys land to her absolutely on a consideration that she is to have a life estate, with power to consume so much of the *corpus* of the property as should be necessary for her support, and that the remainder is to go to a daughter, is not within or affected by the rule that, where there is an absolute grant coupled with a right inconsistent therewith, such right, to the extent of such inconsistency, must fail. The right of the daughter to take what was left is in no way inconsistent with the primary right vested in the wife.

APPEAL from a judgment of the circuit court for Walworth county: FRANK M. FISH, Circuit Judge. *Affirmed.*

The complaint in the first instance was in form to remove a cloud upon title to real estate. It stated in substance that plaintiff was the owner in fee simple of the land described in the complaint; that defendant claimed to own the same under a deed from Rebecca Campbell, good upon its face, but that it was never delivered to the grantee. There was the usual prayer appropriate to such an action. The answer denied the material allegations of the complaint and alleged actual ownership and possession under the disputed deed. By leave of court and against objection by defendant's counsel the complaint was amended by alleging, in substance, that March 16, 1881, Thomas Fryer's family consisted of himself, Rebecca Fryer, his wife, and plaintiff, his only child, then fifteen years of age; that he was the owner of the real estate in question; that he was in poor health, and, fully realizing the uncertainty of his life, he formed the purpose to so dispose of said real estate that his wife

should have it for her life with power to use so much of the value thereof as should be necessary for her comfortable maintenance and support, and that the residue, if any, should go to plaintiff; that his wife was fully informed of such purpose and with that in mind proposed that a conveyance of an absolute title to the property should be made to her, promising her husband that if he would not make a will to effect his purpose, but would so convey the property, she would give effect to his wishes by using only so much thereof as should be necessary for her support, leaving the remainder to plaintiff; that, relying on such promise, Mr. Fryer conveyed the property to his wife, intending thereby that the grantee should enjoy it for life with the right to sell the same and use the proceeds so far as necessary for her support, and that the balance, if any remained at the termination of Mrs. Fryer's life, should go to plaintiff; that subsequently Mr. Fryer died and about one year thereafter his widow became the wife of defendant; that June 21, 1895, thereafter, she died; that December 28, 1894, defendant induced his wife, by undue influence, to deed said real estate to him, but that the deed was never actually delivered so as to take effect; that he obtained possession thereof after the death of his wife and recorded it, and thereafter set up a claim to the property thereunder.

Except as hereafter stated, the court found the material allegations of the complaint to be true. There was no finding as to the nondelivery of the deed or its having been obtained by defendant by undue influence. The conclusions of law were to the effect that defendant had no right, title, or interest in the premises in controversy; that plaintiff was the owner in fee thereof and entitled to possession of the same, and that her title should be quieted and perfected as against defendant and all persons claiming under him. Judgment was rendered accordingly.

For the appellant there was a brief by *E. H. Sprague*, at-

torney, and *Sanborn, Luse, Powell & Ellis*, of counsel, and oral argument by *Mr. A. L. Sanborn* and *Mr. Sprague.*

For the respondent there was a brief by *J. F. Lyon* and *D. B. Barnes*, and oral argument by *J. B. Simmons.*

MARSHALL, J. The following questions are presented: Did the court err in allowing the amendment? Was it error to overrule an objection to any evidence under the amended complaint? Did the evidence disclose equities in favor of appellant, or wrongdoing by respondent militating against her right to the relief granted? Was the limitation of the right of respondent's mother to the property void?

In considering the first question we shall assume, without deciding, that the amended complaint did not change the class to which the action belonged; that is, that the original complaint stated a cause of action in equity to establish plaintiff's right to the property in controversy, and that the amended complaint stated such a cause for the same purpose, though that the former was to remove a cloud upon plaintiff's alleged right and the latter to establish such right and to charge appellant as trustee of the title for the rightful owner so far as it had become vested in him. The real subject of the action, the title to the land, and the remedy were the same under the amended as under the original complaint, though the material facts were changed, and the character of the evidence required to render the remedy resorted to effective was also changed. Counsel for appellant make no claim, as we understand it, that there was abuse of discretion in permitting the amendment if power existed in that regard; but they insist that such power did not exist; that the statute limiting the right of amendment of pleadings in cases where the exercise of it will not change substantially the claim or defense, means will not change the facts constituting the cause of action or defense thereto

so as to require substantially different proof. To that many cases decided by this court are cited. An examination of them discloses that they do not deal with the question of power, but with the proper exercise thereof.

Sec. 2830, Stats. 1898, provides that the court may, upon the trial or at any time in furtherance of justice and upon such terms as may be just, permit a complaint to be amended in any respect that does not change substantially the plaintiff's claim. That has had judicial construction many times to the effect that the limit of the power of amendment is only exceeded by a departure from the subject of the action. A substantial change of the "claim," as the term is used in the statute, need only stop short of the substitution of one cause of action for another, as the substitution of a cause of action in equity for one at law or one sounding in tort for one on contract. *Carmichael v. Argard*, 52 Wis. 607; *Lawe v. Hyde*, 39 Wis. 345; *Lane v. Cameron*, 38 Wis. 603; *Kewaunee Co. v. Decker*, 34 Wis. 378; *Fischer v. Laack*, 76 Wis. 313. The following language used by Mr. Justice LYON in the last case cited, clearly indicates the proper construction of the statute as it has been uniformly declared:

"Were this an action in equity, we should grant leave to the circuit court, on a proper showing, to permit the complaint to be amended by inserting the proper averments to entitle the plaintiff to a reformation of the deed. But it is an action at law, and an amendment which would change it into one in equity is not admissible."

So the only limitation upon the power of amendment within the general scope of the subject of the action, broadly considered, is that it must be in furtherance of justice, upon reasonable grounds, in the sense that such must be the purpose of the exercise of the power. Within those limits the discretionary power of trial courts to grant amendments to pleadings is supreme. Outside thereof there is no power to permit amendments at all, because then judicial action would

either be outside the scope of the statute or would be an abuse of power in administering the statute. *Illinois S. Co. v. Budzisz*, 106 Wis. 499. What has been said sufficiently answers the contention that the power of amendment was exceeded in this case; and, as before indicated, no complaint is made of an improper administration of power. Nothing further need be said on this branch of the case.

The decision of the court overruling the objection to any evidence under the complaint because it failed to state facts constituting a cause of action in equity was correct for two reasons: First, the objection was grounded on the idea that, because the complaint alleged title to the realty in plaintiff, and possession thereof in defendant under a void deed, on its face, however, purporting to convey a good title, the plaintiff's remedy was at law. It was impossible for plaintiff to recover without proving *aliunde* the record the invalidity of defendant's deed. This court has several times decided that in such circumstances a plaintiff may vindicate his right to realty, though out of possession thereof, by an action in equity. *Spiess v. Neuberg*, 71 Wis. 279; *Prickett v. Muck*, 74 Wis. 199; *Burrows v. Rutledge*, 76 Wis. 22; *Swihart v. Harless*, 93 Wis. 211; *Kruczinski v. Neuendorf*, 99 Wis. 264; *Gibson v. Gibson*, 102 Wis. 501. In *Burrows v. Rutledge* it was contended by counsel for defendant that, notwithstanding allegations in the complaint that the land was vacant and unoccupied, as a whole, the pleading indicated clearly that the property was in the actual occupation of the defendant under an instrument good on its face and which was effective to vest title in him, if not void as plaintiff claimed, who alleged title under a later conveyance from defendant's grantor; and that, as plaintiff sought to recover on the ground that the first patent was void, his sole remedy was by ejectment. This court, for the purposes of the appeal, assuming the correctness of that construction of the pleading, said that "in cases of fraud, equity and law often

exercise concurrent jurisdiction." 'Where fraud is the foundation of the action and the relief demanded is a cancellation of the instrument under which defendant claims, it would seem that a resort to a suit in equity is proper.' Neither of the two previous cases here cited was referred to, although they covered the subject. Such subject was again treated in *Swihart v. Harless*, and later in *Gibson v. Gibson*, where Mr. Justice WINSLOW said:

"Where the defendant has the apparent legal title of record, and the facts which make that title inequitable or fraudulent as to the plaintiff are not of record, an equitable action is the proper action in which to obtain an adjudication of the plaintiff's rights."

The second reason why we cannot sustain the claim that the court improperly overruled the objection to any evidence under the complaint, because of an insufficient statement of facts to constitute a cause of action in equity, is that such objection was waived by the failure to enter a formal demurrer to the complaint on that specific ground. A demurrer *ore tenus*, as an objection to evidence is called, was not sufficient to raise the question. See *Hoff v. Olson*, 101 Wis. 118, where a large number of cases on the subject are collated.

The principle in equity jurisdiction, often controlling, that a plaintiff cannot use the arm of equity for the redress of his wrong unless he comes into that jurisdiction with clean hands in that he, himself, is not also guilty of inequitable conduct, is invoked upon the following state of facts: When appellant and respondent's mother were married the premises in controversy were incumbered by a mortgage of $400, which was afterwards increased to $850 prior to the mother's death, the proceeds of the increase being used for the preservation of the farm and the support of appellant and his wife. They lived on the property some thirteen years, during which time they enjoyed the use thereof, and appel-

lant expended in their support and in preserving and improving the farm, not only the income from the same, but a pension which he received of from $8 to 12 per month, and property which he possessed to the amount of several hundred dollars. His wife was sick for some two years before she died, so as to require personal attention, which was rendered mainly by him. Respondent for several years prior to her mother's death, by reason of the belief that she had not been well treated by appellant, which belief was not wholly without foundation, did not give any aid to appellant in the care of her mother. The property was finally conveyed to appellant by his wife shortly before her death as a recognition of his kindness as her husband, a note of $200 being executed at the same time and set aside to be delivered to respondent after her mother's death. We are unable to see anything in that but the mere performance of a husband's duty by appellant, and perhaps a violation of duty on the part of respondent, from which no equity arose in favor of appellant. He did not demand pay for services rendered his wife or receive the comveyance of the property as pay for such services. It was a gift, pure and simple, suggested by the relationship existing between the parties. True, the daughter owed the moral obligation to aid her mother when necessary, but the primary duty to care for the latter rested with her husband and he discharged it. That gave him no right to claim compensation therefor from his wife. Neither did it furnish a legitimate basis for her to bestow the property in question as a gift upon him. It raised no equity against respondent enabling appellant to claim that which was absolutely hers by her father's scheme for disposing of his property. Nothing could have been more foreign to that scheme than that the mother should remarry, thereby raising up the legal and moral obligation of a second husband to furnish her support, and that the satisfaction of such obligation should furnish a jus-

tification for bestowing upon a stranger that which he intended for his daughter. The mother was to have the use of the property so far as necessary to her support during life. That was all. So far as the new relation she contracted provided for her necessities, the property was not needed. Regardless of any breach of respondent's duty, appellant acquired no equitable or legal interest against her because of his performance of his own duty.

In order that a party may successfully invoke the doctrine that he who seeks equity must do equity, or the cognate doctrine that he who comes into equity must come with clean hands, he must show possession by himself or some conflicting equity worthy of cognizance in a court of equity. The former doctrine applies only where each of the adversaries have equitable rights in the subject matter of the action or matter so connected therewith as to be affected by the litigation, without assuming any conduct on the part of one in violation of the principles of equity. The latter doctrine applies where the plaintiff has been guilty of some conduct contrary to good conscience in respect to the subject matter of the litigation or some matters connected therewith and affected by the litigation. In that situation the doors of equity may be closed entirely to him, or if opened at all relief may be granted only on such terms as to purge the transaction of inequitable conduct.

Applying what has been said, it will be readily seen that appellant has no equity in the subject of this litigation or connected therewith. Neither has the respondent wronged him in respect to such subject matter or in any way. If she wronged her mother, as claimed, it had no connection whatever with the subject of this litigation so as to create for appellant an equitable claim against respondent for which he has a right to retain her property.

The doctrine that when a person conveys property to another absolutely and without restriction and then ingrafts

upon the grant an inconsistent limitation thereof such limitation is void, has no application to the facts of this case. By reference to the scheme which Mr. Fryer settled upon for the disposition of his property prior to making the conveyance to his wife, and which was displaced by such conveyance upon the wife's agreeing to carry it out, in order to determine the nature of the trust upon which the property was taken by her and which continued attached thereto in the hands of appellant, it is clear that it contemplated a mere life estate in the wife with power to consume so much of the *corpus* of the property as should be necessary for her support, and that the balance should go to respondent. No absolute conveyance of the property by Mr. Fryer to his wife was intended, except in form, but only a qualified right thereto,— the right to use it for her support,— not the right to dispose of the property by will or otherwise as she might see fit. She was to have the right to use the property during life in any way she saw fit for the purposes of her support, but for no other purpose. She was not to dispose of it *in specie*, or the proceeds thereof, by will or in any other way except to defray the expenses of her support. The right of respondent to take what was left was in no way inconsistent with the primary right vested in her mother, and therefore it was and is unaffected by the rule that, where there is an absolute grant coupled with a right inconsistent therewith, such right, to the extent of such inconsistency, must fail.

By the Court.— The judgment is affirmed.

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WELCH, Appellant, vs. THE TOWN OF GENEVA and another, Respondents.

April 12 — April 30, 1901.

Highways: Bridges: Injuries from defects: Traction engines: Violation of statute: Contributory negligence.

1. Ch. 367, Laws of 1891, provides that the person in charge of a traction engine propelled on any highway shall be liable for all damages caused to any bridge therein, if the engine weighs over five tons, or if he attempts to cross without spanning the bridge with planks. Plaintiff, with an engine weighing over five tons, attempted to cross a bridge without first spanning it. *Held*, that he could not recover for injuries caused by the breaking down of the bridge.
2. In such case there being a direct causal connection between the excessive weight of the engine and the accident, and the act done contributing to the result which followed, the person doing it takes the risk of injury, and is without remedy if it occurs. *Sutton v. Wauwatosa*, 29 Wis. 21, distinguished.

APPEAL from a judgment of the circuit court for Walworth county: FRANK M. FISH, Circuit Judge. *Affirmed.*

The plaintiff was running a traction engine weighing nearly 12,000 pounds along defendants' highway. He came to a wooden truss bridge which spanned a creek or river. He got out, and examined the bridge, and concluded it was safe. He thereupon attempted to cross the bridge without spanning it with planks, as required by ch. 367, Laws of 1891. The bridge broke down, and plaintiff was injured. He brings this action to recover damages for such injuries, claiming that some of the bridge timbers were defective to such an extent as to render the highway defective and dangerous. The court directed a verdict for defendants. Plaintiff appeals.

For the appellant there was a brief by *Ingalls & Ingalls*, and oral argument by *Wallace Ingalls*.

For the respondents there was a brief by *D. B. Barnes*, attorney, and *John B. Simmons*, of counsel, and oral argument by *Mr. Simmons*.

BARDEEN, J. The sole question to be determined is, What effect has ch. 367, Laws of 1891, upon the right of plaintiff to recover for injuries sustained by reason of the insufficiency and want of repair of defendants' bridge, under sec. 1339, Stats. 1898? The duty of towns to keep their roads and bridges in a reasonably safe condition for public use has been discussed so many times by this court that citation of authorities is needless. The law of 1891, above referred to, provides that any person owning or propelling a steam engine upon any highway in this state shall be liable for all damages caused to any bridge or culvert therein in certain cases, among which are as follows:

"When such engine, with its equipments, or attachments, or whatever it may be propelling upon the highway, shall weigh more than five tons, exclusive of team, if so propelled."

"When the person or persons in charge of such engine shall fail to span any bridge or culvert, before crossing the same, with planks at least two inches thick, twelve inches wide, and sixteen feet in length, over which the wheels shall pass in crossing such bridge or culvert."

It is admitted that the engine which plaintiff was running weighed in excess of five tons, and that he did not span the bridge with planks as required. It is not claimed by plaintiff that he is not liable for the damages sustained by the defendants for the breaking of the bridge. Admitting this liability, he still insists that under the principle announced in *Sutton v. Wauwatosa*, 29 Wis. 21, he should be permitted to recover. In attempting to apply that case to the situation here presented, the plaintiff fails to appreciate the exact point involved. The bridge was old and rotten. Plaintiff drove his cattle across it to market on Sunday. He was

violating the provisions of the state law in so doing. It was held that it was no answer for the town to urge this fact, as there was no connection between the violation of the Sabbath law and the defective bridge. As said in the opinion:

"The fact that the traveler may be violating this law of the state had no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial, so far as the cause of it or the question of contributory negligence is concerned."

Herein lies the distinction between the cases. Here there is a direct causal connection between the excessive and unlawful weight of the engine and the accident which occurred. It is impossible, without entering the field of speculation, to say whether the accident would have happened had the engine been of less weight, or whether it would have happened at all had the bridge been spanned by planks as the law requires. If plaintiff used an engine of excessive weight, or failed to properly span the bridge with planks, and injury resulted to the bridge, he was directly liable for such injury. The principle involved is akin to that of contributory negligence. When the act done directly contributes to the result which follows, the court will not enter into speculation to determine the relative blame of the parties. There was no want of repair on the bridge. The towns were not bound to anticipate that the bridge would be used in an unusual or extraordinary way. *Wilson v. Granby*, 47 Conn. 59; *Clapp v. Ellington*, 51 Hun, 58; *Clulow v. McClelland*, 151 Pa. St. 583; *McCormick v. Washington*, 112 Pa. St. 185. They need not anticipate that an engine heavier than the limit fixed by statute would be driven over their highways. Whenever that is done, the person so doing takes the risk

of injury, and is without remedy if it occurs, when the excessive weight contributes to produce the same. It appearing conclusively that the using of this heavy engine contributed directly to produce the accident complained of, we see no ground upon which the plaintiff can base a right of recovery. It is further urged by defendants' counsel that plaintiff inspected the bridge before crossing, and concluded that it was safe, and hence the towns were not negligent for failure to know of the defect which an examination so made failed to disclose. This is the conclusion stated in *Clulow v. McClelland, supra*, but inasmuch as the evidence fails to show that such examination was anything more than cursory, we prefer to base this decision upon the point first mentioned.

By the Court.—The judgment is affirmed.

DUNLAVEY, by guardian *ad litem*, Appellant, vs. RACINE MALLEABLE & WROUGHT IRON COMPANY, Respondent.

April 13 — April 30, 1901.

Master and servant: Negligence: Evidence: Statutes: Fire escapes.

1. A factory caught fire, and a servant sustained injuries by jumping from a third-story window. In an action for such injuries it appeared, among other things, that the master maintained a vat containing inflammable material at a point from thirty to thirty-five feet from a trip hammer operated in connection with the factory; that sparks from the trip hammer would not retain sufficient heat to cause any substance to ignite for a greater distance than twenty feet; that the fire was first discovered on a rack beside the vat, the rack being used to drain articles that had been dipped into the vat; that the rack was covered at the time, but in endeavoring to put out the fire the cover was knocked off, and soon thereafter fire appeared in the vat; and that the same conditions had existed for several years without developing danger from sparks. *Held*, in-

sufficient to support a verdict that the master was negligent in locating the vat and rack the distance they were from the trip hammer.

2. Ch. 355, Laws of 1895, provides that every factory building three stories or more in height, in which more than twenty-five people are employed, shall be provided with iron fire escapes on the outside of the building, but that its provision shall not apply to any buildings "now erected" which are supplied with a "reasonable fire escape or fire escapes." Defendant's factory, containing more than twenty-five employees, was erected prior to the passage of said act, and was in part three stories in height. There were five windows on the side of the three-story part, which looked out on the flat roof of the two-story part, the middle window extending to the floor of the third story, and to within one foot of the flat roof, the other windows being about three feet above such roof. Along one side of the two-story part there was a lean-to, the roof of which was six or seven feet below the roof of the two-story part, and about seven feet from the ground, with a firm ladder connecting the two roofs. There were inside stairways, three or four feet wide, at each end of the three-story part, leading from floor to floor to the ground floor below. In an action for personal injuries to an employee sustained by jumping from the third-story window, the factory having caught fire, it was *held* that the factory in question was, at the time of the passage of that act, supplied with a reasonable fire escape, within the meaning of that statute.

APPEAL from a judgment and order of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Ingalls & Ingalls*, attorneys, and *William Smieding, Jr.*, of counsel, and oral argument by *Mr. Wallace Ingalls* and *Mr. Smieding.*

For the respondent there was a brief by *Kearney & Thompson*, and oral argument by *T. M. Kearney* and *J. V. Quarles.*

CASSODAY, C. J. This is an action for personal injuries sustained by the plaintiff July 13, 1898, when he lacked two days of being fourteen years of age, while in the employ of the defendant in its factory in Racine, and in the act of es-

caping from the building, which was at the time being destroyed by fire alleged in the complaint to have been caused by the negligence of the defendant in permitting to be operated on the ground floor of such factory certain trip hammers, anvils, and forges in close proximity to a large, open, unprotected, and exposed vat or tank negligently situated on said ground floor, containing at all of the times herein mentioned a quantity of highly volatile and inflammable material, and by reason of such close proximity, and on said date, while said trip hammers, forges, and anvils were in operation by defendant, burning bits of heated iron, sparks of fire, and redhot scales of iron escaped, flew, and were driven from said trip hammers, anvils, and forges into, on, and about said tank so containing such inflammable substances, and thereby caused the same to ignite, and said entire factory building immediately took fire therefrom, and quickly filled with thick, black smoke and poisonous gases, which resulted in the entire destruction of said building. The complaint alleges that at the time of the fire plaintiff was engaged on the third floor, and by reason of the fact that the building was suddenly filled with fire, smoke, and gases, he was deprived of all means of escape from the burning building, except through a window in the third story, situated near the place of his employment; that, as the only means of escape from the building, he leaped or dropped from the window to the sidewalk or ground, a distance of nearly forty feet, and struck with great force thereon, and, as a result from the fall, fractured both lower limbs near the ankles, and sustained an impacted fracture of both ankle joints, and also sustained serious permanent injuries to the back and spine. The complaint further alleges, in effect, that the factory building was three stories in height, and for at least four years prior to its destruction was occupied in practically the same manner, defendant employing therein during all of that time more than twenty-five per-

sons; that at no time during such occupancy was the factory building provided with any fire escapes, as prescribed in ch. 355, Laws of 1895. Issue being joined and trial had, the court at the close thereof directed a verdict in favor of the defendant; and from the judgment entered thereon accordingly, and also from the order denying a new trial, the plaintiff appeals.

As stated, in substance, in the brief of attorneys for the plaintiff, this large manufacturing plant of the defendant had stood as then constructed about five years. It fronted on West street on the south, and extended to Milwaukee avenue on the west, and Geneva street on the east. It was three stories high for the whole distance on Geneva street, being sixty feet, with windows for each story. The front on West street was three stories high from Geneva street west for a distance of ninety-six feet, with an entrance near the middle, and then it was two stories high for a distance of forty-four feet to Milwaukee avenue, with windows for each story. There were five windows on the west side of the three-story part, looking out onto the flat roof of the two-story part; the middle one extending to the floor of the third story. Along on the north side of the two-story part was a one-story wooden lean-to, which extended east about seventy-five feet from the west line of the building. It was over fourteen feet from the ground floor in the three-story part to the floor of the second story, and twelve feet from the floor of the second story to the floor of the third story. The one and two story parts, together, were larger in area than the three-story part. The roof of the two-story part was flat, and descended towards the north. The distance from the roof of the second story to the roof of the one-story part was six or seven feet, and the distance from the roof of the one-story part to the ground was about seven feet. Between the roof of the one-story part and the roof of the two-story part there was a wooden ladder

reaching from one to the other, spiked to the cornice. The roof of the one-story part along a portion of the distance was just below the window sills of the second story. There were windows in all the several stories. There were large doors on each floor in the east end of the three-story part, opening on Geneva street. There were large doors, used for a driveway, on the ground floor of the three-story part, about the center, leading in from West street, on the south, and which was a main entrance. At the north side of the three-story part, and about the middle, there was an elevator shaft. There was an inside wooden stairway, from three to four feet wide, at each end of the three-story part, leading from floor to floor, and thence to the ground floor of the blacksmith shop below. The top floor of the three-story part was partitioned off into several compartments on either side of a passageway through the middle leading to the stairways and openings at each end. The third floor was the finishing department, where the polishing, buffing, and japanning were done. The second floor of the three-story part contained machinery, and the ground floor was the blacksmith shop, in which were operated several trip hammers, drop hammers, anvils, forges, and a large machine called a bulldozer. The blacksmith shop had a ground floor, excepting towards the westerly end, where there was a wooden floor or a platform made of boards laid on the ground, for the men to work on in ironing off whiffletrees and neck yokes. Such board floor was about sixteen feet wide and about twenty-five feet long. Along a portion of the south side of this platform a couple of planks were fastened, and on these planks were set some anvils for use by employees working on the platform. A vat, with draining rack attached, used for dipping and draining neck yokes and whiffletrees, and containing a quantity of benzine and gloss oil, was situated close to the north side of the platform in the blacksmith shop. The tank was about five feet long and two feet wide,

and made of iron, and was buried halfway underground, and the vat proper was covered with a board cover, which had been in use for several years. The draining rack connected with the vat was inclined so the drip would run back into the tank, instead of on the ground, on which neck yokes and whiffletrees were laid to drain after dipping. The vat was five or six feet further north from the trip hammer than the old one formerly was, in order to be safer from fire. The fire was first discovered on the draining rack, and almost at the same time, through cracks or openings in the cover, fire was discovered in the vat. The long way of the platform in the blacksmith shop was east and west, wholly situated west of the main driveway going into the blacksmith shop from the south; and the bulldozer was east of the west end of the platform, and east of the main driveway in from the south. Propelka's trip hammer was situated about due south from the vat, and was the nearest trip hammer to the vat, and was situated on the south side of the platform, and about five feet from the south side thereof. This hammer had been operated by Propelka at the same place and on the same kind of work for several years, and was near the south wall of the blacksmith shop, and west of the south entrance. In operating this machine Propelka stood between the south wall of the blacksmith shop and the hammer, facing the vat to the north, with his forge to the right. Carlson operated a trip hammer in the blacksmith shop about twenty-five feet distant from the Propelka hammer, on the east side of the driveway. At the time of the fire there were at least twenty-five men and boys employed on each of the three floors. Gus Bartz had charge of the boys on the third floor when the foreman was out. At the time of the fire the plaintiff was employed, with others, including Gus Bartz, in the southwest corner room on the third floor, and there were windows from that room west looking out onto the two-story roof, which room was within three feet of the fire.

The two-story part was occupied as the woodworking department, and the one-story part contained the annealing ovens. This manufacturing plant in no way joined or was connected with any other building or buildings.

The accident happened just after the noon hour. According to the record, the origin of the fire was and is unknown. It was first discovered on the rack mentioned, and was then about as large as a lamplight. How it originated is left by the evidence to mere conjecture. The rack was just on the west side of the vat, and inclined therefrom towards the west, as stated. The vat was covered on that day, but in trying to put out the fire the cover was knocked from the top by some one, and soon thereafter fire appeared in the vat. Whether the flame from the rack ran down into the vat or not, the witnesses were unable to say. The theory of the plaintiff, as indicated from the statement of his counsel, seems to be that the fire was started by sparks flying from Propelka's trip hammer, and setting fire to the vat or rack, or both. As indicated, that trip hammer was situated south of the platform described, and the vat and rack were both north of that platform, and directly or nearly directly north from that trip hammer. It is also undisputed that the vat and rack were from thirty to thirty-five feet north of that trip hammer. There is no evidence tending to prove that such sparks from that trip hammer would retain sufficient heat to cause any substance to ignite for a greater distance than twenty feet, but it appears to be affirmatively established to the contrary. Certainly, there is no evidence tending to prove that they would retain such heat for a distance of twenty-five feet,— much less, thirty feet. The same condition of things had existed for many years without developing any danger from such sparks. No verdict for damages could be sustained without being supported by evidence. Such a verdict could not rest upon mere conjecture,— obviously not, when contrary to all reasonable prob-

abilities. We must hold that the evidence is insufficient to support a verdict that the defendant was negligent in locating the vat and rack the distance they were from the trip hammer.

Counsel for the plaintiff further contend that the plaintiff is entitled to recover by reason of the absence of any fire escape, as prescribed by ch. 355, Laws of 1895 (sec. 4575*a*, S. & B. Ann. Stats.; sec. 4390, Stats. 1898). The seventh section of that act, then and now in force, provides that "none of the provisions of this act shall apply to any buildings *now erected* and which are supplied with a reasonable fire-escape, or fire-escapes." Sec. 1636*e*, Stats. 1898, p. 1187; sec. 25, ch. 351, Laws of 1899. The several parts of the building in question, as described by the plaintiff's counsel, are given above. It was constructed in 1894, and hence the provisions of ch. 355, Laws of 1895, quoted, were applicable to this building. The plaintiff testified to the effect that when the whistle sounded he started out from his room, in the southwest corner of the building, on the third floor, to see what was the matter,— what was going on in the shop; that he went east to where some workmen were at the fire hose, and heard some one shout, "Fire! Get out;" that he then turned back to his room to get his coat; that there was neither smoke nor fire on the third floor at that time; that he tried to go down the west stairway, and was driven back by the smoke; that he then went to the stairway at the east end of the building, and reached the second floor, and started down the stairway to the first floor; that the door at the foot of that stairway was opened by some one, and the smoke drove him back to the second floor; that he stood for a time at the east doorway of the second floor, which was cut down to the level of the second floor, and was open at the time; that he then went to the third floor, and into a small room in the southeast corner, from the window of which he dropped to the ground. Thus it appears from

the plaintiff's testimony, and the statement made as to the condition and shape of the different parts of the building, that when the fire started he was in his room on the west side of the third floor of the building; that, after going to the east part of the building to learn the cause of the alarm, he returned to his own room for his coat; that five windows opened from that third floor out onto the flat roof of the two-story part, descending towards the north; that four of such windows came down to within three feet of the third floor; that the middle window of the five was at the westerly end of a hallway extending east and west, and was cut down to the level of the third floor, so that it was only about one foot from that door down to the flat roof of the second story; that it was so cut down in order to furnish easy means of egress from the third story to the flat roof of the second story; that such flat roof of the second story was only a few feet below any of the five windows on that west side; that such flat roof of the second story had been much used as a lounging place during the noon hour by the employees on the third floor, including the plaintiff; that the distance from the flat roof of the two-story part to the flat roof of the one-story part was not more than six or seven feet, with a firm ladder upon which to descend; that the distance from the flat roof of the one-story part to the ground did not exceed seven feet. The statute relied upon only required "one or more" fire escapes in buildings "three or more stories high." After careful consideration, we have reached the conclusion that the building in question was at the time of the passage of the act relied upon, "supplied with a reasonable fire escape," within the meaning of that statute.

By the Court.—The judgment and order of the circuit court are both affirmed.

DODGE, J., took no part.

DICKEY, Appellant, vs. PUGH, Respondent.

April 13 — April 30, 1901.

Appeal: Findings of fact, when reviewed: Specific performance: Tender of performance.

1. The supreme court will not review findings of fact, in the absence of exceptions to the findings incorporated in the bill of exceptions.
2. In an action for specific performance, a finding that there has been no tender of performance, and that it did not appear that plaintiff was able, ready, or willing to perform the contract if given an opportunity so to do, is sufficient to justify a judgment dismissing the action.

APPEAL from a judgment of the circuit court for Racine county: JOHN GOODLAND, Judge. *Affirmed.*

The plaintiff seeks to secure the specific performance of a parol contract, partially performed, for the conveyance of certain property described in the complaint. The findings show that the A. P. Dickey Manufacturing Company was the owner of the property in 1898. The assignee sold the property to defendant for $3,183.32, subject to a mortgage for $10,500, upon which there was back interest amounting to $673. Defendant took up the old mortgage and executed a new one, paid the back interest, and entered into possession. Plaintiff desired to purchase the property, and entered into negotiations with defendant which resulted in a written contract being drawn, but which was never signed by either of the parties. By its terms defendant was to be paid all sums he had paid, together with an account he had against the corporation aforesaid, and was to be relieved from all personal liability on account of running the business and on account of the mortgage mentioned. The plant was to be conducted by plaintiff on a salary, and defendant was to have full control of the property, and the money was to be paid and defendant's release secured by February 1,

1900. Up to that time defendant was willing to carry out the agreement. Plaintiff failed to make the payment, and the court finds he has made no tender or offer of payment, and that it does not appear that he is able, ready, or willing to perform. Thereafter defendant notified plaintiff he had made other arrangements regarding the business. The court concluded that plaintiff was not entitled to relief, and that his complaint was without equity. Judgment was directed for defendant. No exceptions to the findings are preserved in the bill of exceptions. The plaintiff brings this appeal from the judgment dismissing the action with costs.

Wallace Ingalls, for the appellant.

For the respondent there was a brief by *Palmer & Gittings*, attorneys, and *Thomas M. Kearney*, of counsel, and oral argument by *Mr. W. S. Palmer* and *Mr. Kearney*.

BARDEEN, J. There being no exceptions to the findings incorporated in the bill of exceptions, this court will not review the correctness of the court's conclusions upon the facts involved. The exact question was covered by the recent case of *Nichols v. Superior*, 109 Wis. 643, and nothing further need be said. The pleadings and findings amply sustain the judgment. Waiving the question of the contract being sufficiently performed to entitle the plaintiff to relief, the finding that there has been no tender of performance, and that it did not appear that plaintiff was able, ready, or willing to perform the contract if given an opportunity, would be sufficient to justify the judgment entered.

By the Court.—The judgment is affirmed.

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GLASSBRENNER, Appellant, vs. GROULIK, Respondent.

April 13—April 30, 1901.

Injunction: Irreparable injury: Remedy at law: Appeal: Order: Certificate of clerk.

1. Upon a complaint alleging that plaintiff, a dairyman, was the owner of certain ice, which he had allowed defendant to cut and store on premises occupied by defendant under an agreement that both parties were to use the ice, but that defendant denied him access to the premises and prevented him from using the ice, and that thereby his business would be destroyed and he would suffer irreparable injury, a preliminary injunction was granted, which was dissolved on motion founded on defendant's answer and affidavits denying such agreement. *Held*, that there was no abuse of discretion in vacating such injunction, the allegation of irreparable injury having little weight, since it is a matter of common knowledge that ice is a commodity which may at all times be purchased in the market, and it was nowhere alleged that the defendant was insolvent or that a judgment for damages against him could not be collected. *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436, distinguished.
2. Although sec. 3050, Stats. 1898, requires that on an appeal from an order, the clerk shall transmit the order appealed from and "the original papers used by each party on the application therefor," an appeal will not be dismissed where the order appealed from names the papers upon which it is based, and those papers are all returned by the clerk, notwithstanding the certificate of the clerk is defective in failing to certify that the papers attached are the papers which are required by such statute to be returned.

APPEAL from an order of the municipal court of Racine county: D. H. FLETT, Judge. *Affirmed.*

This is an appeal from an order dissolving an injunctional order. The complaint upon which the preliminary injunctional order was granted alleged, in substance, that on the 1st of January, 1900, the plaintiff was in possession of forty-two acres of land in Racine county as tenant, and that his term did not expire until April 1, 1900, and that he was the

owner of the ice upon a certain pond upon said land; that on January 2, 1900, he made an agreement with the defendant, who was then the owner of a contract for the conveyance to him of said land, by which the defendant was to cut the ice on said pond, and store it in the ice house on the premises, using the plaintiff's ice tools and shavings therefor, and permit such ice to remain on the premises in said ice house during the year 1900, it being understood that both parties might use said ice during said year, and that the plaintiff should have the right to enter on the premises and take such ice as he might desire to use in his business; that the plaintiff was, and now is, engaged in the dairy business, and that it was essential to his business that he have a store of ice to keep the milk and cream from spoiling; that defendant harvested said ice in pursuance of the agreement, and the plaintiff fully performed his part of the agreement, and that April 1, 1900, the defendant took possession of the premises, and now is in possession of the same, having obtained a deed thereof from the former owner; that the defendant permitted the plaintiff to enter on the premises, and to take ice from said ice house, for use in his business, until June 27, 1900, when the defendant, without cause, refused to allow the plaintiff to enter on said premises and take any more ice therefrom; that, unless defendant is restrained from interfering with the plaintiff's right to enter said premises and use said ice, the plaintiff's business will be destroyed, and he will suffer irreparable loss; that there is sufficient ice on said premises to supply the wants of both parties during the year 1900; and that plaintiff has no other ice, and is unable to procure any other, and relies wholly upon said ice for use in his business.

The injunctional order granted upon this complaint, without notice to the defendant, restrained the defendant from interfering with the plaintiff's business and his right to enter on the premises and take ice therefrom. The motion

for dissolution of the injunction was based upon the answer of the defendant, together with his affidavit and the affidavit of his son. The answer admitted the plaintiff's occupation and tenancy of the premises, and admitted his ownership and possession thereof since April 1, 1900, but denied the making of any agreement by which the plaintiff was allowed to take ice from the ice house on said premises after April 1, 1900. The affidavits of the defendant and his son denied at length the making of any such agreement with regard to the use of ice as set forth in the complaint. Upon the hearing of the motion for dissolution of the preliminary injunctional order, the plaintiff filed an additional affidavit, to the effect that, if the injunction were dissolved, he would be without remedy, for the reason that the ice would be used up and melted by the time of the trial of the action, and the plaintiff's business would be ruined. Upon the hearing of the motion, the preliminary injunctional order was vacated, and the plaintiff appeals.

For the appellant there was a brief by *Heck & Kreuzke*, and oral argument by *Charles Kreuzke*.

For the respondent there was a brief by *Martin J. Gillen*, attorney, and *William Smieding, Jr.*, of counsel, and oral argument by *Mr. Smieding*.

WINSLOW, J. It is manifest that there was no abuse of discretion in vacating the preliminary injunctional order. It is common knowledge that ice is a commodity which may at all times be purchased in the market. It is nowhere alleged that the defendant was insolvent, or that a judgment for damages against him could not be collected. The allegation of irreparable injury is therefore of little or no weight. If plaintiff was debarred from obtaining his ice from the ice house, he could obtain it elsewhere, and he could collect his loss or damage from the defendant if he showed himself entitled to recover any loss or damage. The case is not one

where, if the plaintiff recovers, his remedy will be valueless, or he will suffer irreparable injury unless the *status quo* be maintained; hence the case of *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436, is not applicable.

A motion was made to dismiss the appeal because the return of the clerk does not certify that the papers returned are the original papers (or copies as the case may be) used upon the hearing of the motion, as required by sec. 3050, Stats. 1898. The return simply states that the papers returned are "original papers in the action." This court has frequently held that, in case of an appeal from an order, where neither the return nor the record itself shows that the papers returned are all of the papers used by each party on the motion, the appeal will be dismissed. *Carpenter v. Shepardson*, 43 Wis. 406; *Tenney v. Madison*, 99 Wis. 539; *Superior C. L. Co. v. Superior*, 104 Wis. 463. In the present case, however, the order appealed from names the papers upon which it was based, and, as these papers are all returned by the clerk, it affirmatively appears upon the record that the whole case which was before the trial court is before us, notwithstanding the defective certificate of the clerk. Hence we do not find it necessary to dismiss the appeal.

By the Court.— Order affirmed.

CLAUSEN, Appellant, vs. HEAD and others, Respondents.

110 405
114 479
110 405
115 661
110 405
117 454

April 13 — April 30, 1901.

Partnership: Assumption of corporate powers: Status as corporation: Estoppel: Election between remedies: Privity: Res adjudicata: *Intent: Presumptions.*

1. Where a person deals with an association of individuals as a corporation, such dealing, by estoppel, as to such transaction, fixes the status of the company to be what it was represented and recognized to be therein.

2. Where certain persons associated together assumed to be a corporation, and as such executed an assignment for the benefit of creditors, and a creditor filed his claim in such assignment proceedings, the claim, if in existence against the association in any capacity, became a claim against the company as a corporation and the assignee in his representative capacity.
3. Even though the creditor, before filing his claim, was not bound by estoppel to recognize the association, as a corporation, as his debtor, and could have proceeded against the association as a corporation, outside of or within the assignment proceedings, or against the members thereof as partners, yet having made an election between the two courses, with knowledge of the facts, by filing his claim with the assignee of the corporation as such, he thereby waived the one not chosen.
4. There is no such privity between the members of a corporation and the corporation, that a judgment between a third person and the corporation is *res adjudicata* in subsequent litigation as to the same or any other cause of action between such person and the members of the corporation.
5. The principle that a person may sue a corporation and proceed to final judgment without prejudice to his thereafter suing upon the same cause of action, or another cause of action involving the same wrong, against the members of such corporation, applies where there are independent causes of action or remedies against such members and the corporation, that may be pursued regardless of each other, for independent satisfactions where there are independent wrongs, or a single satisfaction where there is but a single wrong, and the two remedies are not inconsistent.
6. The doctrine that intent to make choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the pursuit of one of the remedies, applies only where action in the first instance was taken in ignorance of the facts; but where knowledge of the facts exists, intent is conclusively presumed as a matter of law, and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time.

APPEAL from a judgment of the circuit court for Kenosha county: FRANK M. FISH, Circuit Judge. *Affirmed.*

Action on a contract to recover of defendants as partners the sum of $1,000. Defendants, for some time prior to 1895, pretended to be a corporation by the name of Dan

Head & Co., and as such carried on a banking business in the city of Kenosha, Wisconsin. At the time named, the company, as a corporation, made an assignment to George Hale for the benefit of creditors. Pursuant thereto said assignee took possession of the assets of the ostensible assignor and proceeded to administer his trust. Plaintiff, pretending to have a claim against said company, with knowledge that it was a mooted question whether the association was a corporation or a partnership, filed his claim in the assignment proceeding, using this language: "This deponent does not admit that Dan Head & Co. is a corporation and does not waive his right to proceed against them or either of them as partners." The assignee filed objections to the claim, and such proceedings were thereafter duly taken that an issue was presented for judicial determination as to whether the claim represented indebtedness of Dan Head & Co. or a liability of one Urban J. Lewis. Such proceedings were duly taken for the final determination of such issue that it was decided, in the circuit court having charge of the assignment proceedings, in favor of the assignee. A judgment was duly rendered to that effect, an appeal was taken from such judgment to this court, and a decision was here rendered affirming the judgment of the court below. *Clausen v. Hale*, 96 Wis. 100. February 2, 1900, in *Slocum v. Head*, 105 Wis. 431, it was decided that Dan Head & Co. was not a corporation, but a partnership; but that the association known by such name might have the status of a corporation by estoppel as to persons who dealt with it as such. Subsequent to the last occurrence referred to, this action was brought against the members of the firm of Dan Head & Co. as partners. The relief sought in the action was the same as that involved in the aforesaid issue formed in the assignment proceedings. The answer to the complaint raised for decision the question of whether the former adjudication of the claim, under the doctrine of *res adjudicata*

or the doctrine of estoppel, or both, precluded plaintiff from retrying the question as against defendants, or whether his claim represented indebtedness of Dan Head & Co. The question was decided in favor of defendants, and from the judgment accordingly entered this appeal was taken.

For the appellant there were briefs by *Baker & Baker*, attorneys, and *Wallace Ingalls* and *A. L. Sanborn*, of counsel, and oral argument by *Mr. Sanborn*, *Mr. Ingalls*, and *Mr. N. L. Baker*.

Peter Fisher, for the respondents.

MARSHALL, J. The judgment must be affirmed upon several grounds, either of which is sufficient. If appellant, in the transaction out of which the alleged claim arose, dealt with the association known as Dan Head & Co. as a corporation, such dealing, by estoppel, as to such transaction, fixed the status of the company to be what it was represented and recognized to be therein. *Slocum v. Head*, 105 Wis. 431. If the dealings with the association, if any such were had, were not with it in the capacity mentioned, since it appears beyond dispute that when the claim was filed with the assignee appellant recognized, for the purposes of the proceeding, the existence of Dan Head & Co. as a corporation and the assignment as that of such corporation, thereby, if the situation were otherwise before, the claim, if in existence against Dan Head & Co. in any capacity, became by estoppel a claim against the company as a corporation and the assignee in his representative capacity as assignee thereof. If appellant, before filing his claim, was not bound by estoppel to recognize Dan Head & Co., as a corporation, as his debtor, if the company was indebted to him at all, he had two remedies to enforce it, which were inconsistent with each other. He could proceed against the association outside of or in the assignment proceedings, as a corporation, or against the members thereof as part-

ners. Having made an election between two courses, with knowledge of the facts, he waived the one not chosen. *Warren v. Landry*, 74 Wis. 144; *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 549; *Carroll v. Fethers*, 102 Wis. 436; *Barth v. Loeffelholtz*, 108 Wis. 562; *Fuller-Warren Co. v. Harter*, *ante*, p. 80.

The foregoing propositions are so well settled, and the application thereof to this case so clear, that a mere statement of them, with the facts, is deemed sufficient to show that they justify the judgment appealed from and require its affirmance, regardless of whether or not it was rendered upon such grounds.

We fully agree with counsel for appellant that there is no such privity between the members of the corporation and the corporation that a judgment between a person and the latter is *res adjudicata* in subsequent litigation as to the same or any other cause of action between such person and the former (Wells, Res Adjudicata, § 179; *Finney v. Guy*, 106 Wis. 256); and that if the judgment in this case were dependent on the doctrine of *res adjudicata* it could not stand. The principle that a person may sue a corporation and proceed to final judgment without prejudice to his thereafter suing upon the same cause of action or another cause of action involving the same wrong against the members of such corporation, applies where there are independent causes of action or remedies against such members and the corporation, that may be pursued regardless of each other, for independent satisfactions where there are independent wrongs or a single satisfaction where there is but a single wrong, and the two remedies are not inconsistent. Such was not the situation of appellant when he filed his claim with the assignee of Dan Head & Co. He neither had nor claimed to have more than one wrong to be redressed. If his dealings in the transaction out of which his alleged claim arose were with the association as a corpora-

tion, he had no remedy at all which involved a denial of corporate existence. At best he had two remedies which were inconsistent, one against the corporation, and one against the members thereof. He was where he could take either of two roads, but not both. The roads reached out in different directions, so that to travel one necessarily required the abandonment of the other, and the choice of one, with knowledge of the facts, destroyed beyond recall the opportunity to take the other. If plaintiff had possessed two entirely independent remedies, not inconsistent with each other, as in *Barth v. Loeffelholtz, supra*, or had but one remedy for a single wrong and failed in the first instance to pursue it (*Fuller-Warren Co. v. Harter, supra; In re Van Norman*, 41 Minn. 494; *Gould v. Blodgett*, 61 N. H. 115; *Schrepfer v. Rockford Ins. Co.* 77 Minn. 291), the situation now would be different. Here, taking appellant at the best for him, there were two remedies each of which required an adjudication of whether the debt involved was that of Lewis. If the indebtedness was not against Lewis, it was indebtedness of Dan Head & Co. as a corporation or as a partnership at the choice of plaintiff, but not the indebtedness of both the corporation and the members thereof. His situation was no better than that of a person who has dealt with another as principal when such other is in fact the agent for third persons. Such person can pursue either the ostensible or actual principal at his election, but not both. Mechem, Agency, § 698. The ostensibly artificial person, Dan Head & Co., by those actively managing the business, was, at appellant's election, either the principal or the agent of those brought into court in this action as defendants. He made his election and the legal consequence was that it precluded him from thereafter taking a different course.

It is suggested that a choice of remedies presupposes intent to make a choice; that without such intent the rule we have discussed does not apply; also, that evidence was erro-

neously excluded which, if admitted, would have shown an understanding between appellant and respondents, when the claim was filed with the assignee, that such filing and the prosecution of the claim in the assignment proceedings should not prejudice appellant's right to proceed against the members of the corporation as partners, and that the reservation of that right expressed in the claim was placed therein by the procurement of respondents, to induce appellant to believe that his rights as to the members of the corporation would not be jeopardized by proceeding against the assignee; that appellant not only did not intend to make an election of remedies, but that respondents are estopped by their conduct from invoking the former judgment as a bar to the prosecution of this action. The two propositions are so tied together, seemingly, that we have stated and will treat them in that way. The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule we have discussed, applies only where action in the first instance was taken in ignorance of the facts. Mechem, Agency, § 699; 7 Ency. of Pl. & Pr. 366. Where knowledge of the fact exists, intent is conclusively presumed as a matter of law; and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time. There is no evidence in the record indicating that appellant acted in ignorance of the facts. All the indications are to the contrary. Nor was any evidence excluded, so far as disclosed by the questions or claimed by counsel, that, had it been admitted, would have shown ignorance. The representations suggested, which the evidence excluded would have shown, admitting that they were made as fully as counsel for appellant claim, referred only to the right to hold the members of the firm or corporation of Dan Head & Co. personally liable for indebtedness due from

such company, in any capacity. The idea advanced here is that appellant, in effect, entered upon a contest with the company as a corporation, as to whether his claim represented indebtedness of such company, with the right reserved by agreement with the members of the company and expressed in his filed claim, in case he failed, to renew the contest in a second action against the members of the company as partners. That is clearly outside of the fair meaning of the reservation in the claim and the oral agreement counsel claims was made.

By the Court.—The judgment is affirmed.

110	412
112	[2] 73
112	[2]193
110	412
116	[1]340

DEHSOY, Respondent, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

April 15—April 30, 1901.

Street railways: Injury to passenger boarding car: Proximate cause: Instructions to jury: Exceptions: Material error: Costs: Printing.

1. An instruction in a personal injury case, in substance, that proximate cause means the efficient or inducing cause, or what sets in motion other causes producing such injury, there being an intimate and close "casual" relation between the first cause and the final result, is erroneous: the relation must be that of cause and effect in natural sequence of events, not mere coincidence of time and place.
2. It cannot be assumed in such case that the use of the word "casual" instead of the word "causal" is a typographical error, since the bill of exceptions imports absolute verity, and the sentence is neither meaningless, nor its meaning impossible or absurd.
3. Where plaintiff was injured, while boarding a street car, by reason of the sudden starting of the car, an instruction that, to warrant a finding that the injury was caused by a want of ordinary care on the part of the conductor, the jury must find that the accident might reasonably have been expected by the conductor, in the exercise of ordinary care as "a man of intelligence, having the knowledge that may be reasonably expected and ought to have

been had" in doing such work, is erroneous, in that it submitted to the jury a false standard of the intelligence and prudence of the man by whose anticipation they might decide the element of probability, and permited them to use as such standard their ideal of what a conductor ought to be, instead of what he customarily is as ascertained by human experience and common knowledge.

4. Where the only exception to an objectionable part of an instruction to the jury is reserved in connection with other parts of the same instruction that are correct, material error cannot be predicated thereon.

5. Costs will not be taxed for printing voluminous parts of the testimony, as to which no question is raised on appeal, and instructions upon various questions, not assailed.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Reversed.*

On the 10th day of December, 1899, the plaintiff attempted to board one of defendant's cars at a crossing in the city of Racine. As he had placed his right foot upon the step and seized the handrail with his right hand, the car was suddenly started, and the plaintiff thrown violently to the ground and injured. Some of these facts were in dispute, but the finding of the jury thereon is not assailed as unsupported by the evidence. A special verdict was had, wherein the defendant was found to be negligent in suddenly starting its car, and that such negligence was the proximate cause of the plaintiff's injury, and that the plaintiff was guilty of no contributory negligence. Damages were assessed at the sum of $1,300, and judgment entered upon the verdict, from which this appeal is taken. Facts bearing upon the specific assignments of error will appear more fully in the opinion.

For the appellant there was a brief signed by *Spooner, Rosecrantz & Spooner*, of counsel, and oral argument by *T. M. Kearney* and *C. P. Spooner.*

For the respondent there was a brief by *Smieding & Smieding*, attorneys, and *Wallace Ingalls*, of counsel, and oral argument by *Mr. Ingalls* and *Mr. William Smieding.*

DODGE, J. The only error which will require discussion is that assigned to the charge of the court in instructing the jury as to the meaning of the term "proximate cause." That instruction was as follows:

"Generally speaking, as the term proximate cause is used in this question, it means the efficient or inducing cause, the cause acting directly and producing the injury, or what sets in motion other causes producing such injury, there being an intimate and close casual relation between the first cause and the final result. In either case such producing cause is held to reach to the injury, and to be, in a legal sense, proximate to it. But you are instructed in this connection that, in order that the want of ordinary care on the part of the conductor may be found to be the approximate cause of the injury, it is not enough to show, and for you to find, that such injury was a consequence of his act, but, to warrant such a finding, it must appear to your satisfaction from a preponderance of the evidence that it might reasonably have been expected by such conductor, in the exercise of ordinary care as a man of intelligence, having the knowledge that may be reasonably expected and ought to have been had in doing such work, that such accident might probably result from his conduct."

The first criticism of this charge is that it authorizes the jury to find defendant's negligence the proximate cause of plaintiff's injury if the relation between them is "casual." If that idea was in fact conveyed to the jury, obvious error was committed, for the relation must be that of cause and effect in natural sequence of events, not mere coincidence of time or place. Of course, the proper word in the sentence complained of was "causal," not "casual," and we have little doubt the circuit judge intended to speak the former. If we were in a field permitting speculation, we should think it highly probable he did so, and that the contrary appears only by typographic error. But we may not speculate. The bill of exceptions imports absolute verity. It has been submitted to the respondent's attorneys for scrutiny and correction, and thereafter the circuit judge has

himself certified to its correctness. Were the sentence, as written, meaningless, or its meaning obviously impossible and absurd, we might think misleading of the jury impossible. That, however, we cannot say. To the untrained lay mind it may seem by no means unreasonable that a close and intimate, though casual, relation between two events may, in law, be equivalent to proximate causation. The readiness of such minds to skip the chasm between *post hoc* and *propter hoc* has characterized human logic and philosophy for centuries, and to a jury might well seem authorized by the sentence under criticism.

A further complaint made of the charge is that it instructs the jury that they may find proximate causation if the injury "might reasonably have been expected by the conductor in the exercise of ordinary care *as a man of intelligence*, having the knowledge that may be reasonably expected and *ought to have* been had in doing such work." It is urged that only when such injury might have been expected by a man of *ordinary* intelligence and *under like circumstances* is there proximate causation in law. Without deciding that the omission of such qualifications is error, we are clear that the charge would have been more nearly accurate had it contained both of them. The standard with which comparison must be made to ascertain whether any injury might reasonably be anticipated is the conduct or foresight of ordinarily prudent, careful, and intelligent persons. The use of either of these adjectives without the qualifying adverb conveys the idea of something higher than the ordinary. A prudent man or an intelligent one is properly so characterized only because he is distinguished from the great mass of mankind by his prudence or intelligence. He is not typical of the mass or the average, but differentiated therefrom by the possession of the particular quality in higher degree. In applying the law of negligence, juries should have fully in mind that the duty demanded is that

care and that foresight, and only that, which the great mass of mankind, or the type of that mass, the ordinarily prudent man, exercises under like circumstances. *Nass v. Schulz*, 105 Wis. 146; *Hudson v. N. P. R. Co.* 107 Wis. 620.

The instruction quoted is further assailed in that by the last clause it permits to the jury a false standard of the intelligence and prudence of the man by whose anticipation they may decide the element of probability. He is described as one having the intelligence that "ought to have been had in doing such work." This necessarily means such as the jury think ought to have been had, which may differ from that ordinarily and customarily found in such employment. It permits the jury to use as a standard their ideal of what a conductor ought to be, instead of that which he customarily is, as ascertained by actual human experience and common knowledge. In this, error was committed. *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482; *Wills v. Ashland L., P. & St. R. Co.* 108 Wis. 255.

A further error is assigned upon the charge with reference to the damages, which, it is claimed, authorizes the jury to allow for any reasonably certain future impairment of plaintiff's health or physical condition resulting from *any* injury suffered in the past, instead of limiting it to the injuries ascribed to defendant's negligence. This was obviously a careless use of the word, in view of the fact that there was some evidence of an ancient injury, to which might have been ascribed some of the symptons disclosed; but we cannot consider it as a reversible error, for the reason that the only exception reserved is taken not alone to that portion of the charge, but to that and others which are correct. Its repetition is not to be expected upon another trial.

The latter consideration absolves us from the examination of other assignments of error, two of which are to admission of evidence. The exceptions reserved are to matter of

verbiage, which is not likely of repetition on another trial, which must be ordered by reason of the errors already pointed out. We forego discussion of the error assigned upon the claim that the verdict is excessive, for the same reason.

Respondent calls our attention to the fact that the printed case is considerably more voluminous than is at all necessary for the consideration of the errors assigned. It contains substantially all of the evidence in the bill of exceptions, including that bearing upon the negligence of the defendant, and the conduct of the plaintiff in attempting to board the car, as to which no question is raised upon this appeal. The case also includes the instructions upon various questions, not assailed. At least thirty printed pages are entire surplusage and needlessly printed, and the expense thereof ought not to be taxed as costs.

By the Court.— Judgment reversed, and cause remanded for new trial. In taxing costs the expense of printing thirty pages of the case will not be allowed.

TISHACEK, Administrator, Appellant, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

April 15 — April 30, 1901.

Street railways: Negligence: Accident at street crossing: Children: Court and jury.

A motorman on an electric car, when about sixty feet from a street crossing, seeing a five-year-old girl start from the side of the street to cross, immediately sounded his gong and applied the brake. When the child was about twelve feet from the track, she stopped and looked at the approaching car and continued to do so until she reached a point three or four feet from the track, when she stopped, still looking at the car, and thereupon the motorman threw off the

brake and allowed the car to drift along. When the car reached a point about six feet from the crossing, the child suddenly started across in front of the car, and was run over and killed. The testimony tended to show that the speed of the car was from eight to sixteen miles per hour, and that the car ran from seventy to eighty feet after it struck the child, notwithstanding the efforts of the motorman to stop it with the brake. *Held*, that no inference of negligence could be drawn from the conduct of the motorman in proceeding to send his car onward past the child, nor from his subsequent conduct; and that the trial court properly directed a verdict for the defendant. CASSODAY, C. J., dissents.

APPEAL from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Affirmed.*

The plaintiff's intestate, a little girl five years old, returning from school at about 11:30 a. m. of November 6, 1899, when crossing Douglas avenue, in the city of Racine, at its intersection with St. Patrick street, was run over and killed by one of defendant's cars. This action is brought to recover damages therefor. At the close of the evidence a verdict for the defendant was directed upon which, after motion for new trial, judgment was entered, from which this appeal is brought.

For the appellant there was a brief by *Smieding & Smieding*, attorneys, and *Wallace Ingalls*, of counsel, and oral argument by *Mr. William Smieding* and *Mr. Ingalls.*

For the respondent there was a brief signed by *Spooner, Rosecrantz & Spooner*, of counsel, and oral argument by *C. P. Spooner* and *T. M. Kearney.*

DODGE, J. The principal question presented by the assignment of error is whether the evidence, upon consideration most favorable to the plaintiff, tends to establish negligence on the part of the motorman in charge of defendant's car. The motorman's own narrative is the only complete statement of his conduct. He testifies that running north on Douglas avenue, upon a slight upward grade less than one

foot to the 100, at about eight miles per hour, when about sixty feet from the south crossing of St. Patrick street, he saw this little girl start from the east side of Douglas avenue to cross that street. He apprehended that she might get on the crossing in front of his car, and immediately applied his brake and sounded his gong. He continued this until the little girl stopped, as hereinafter stated. There is no dispute that he had plenty of time to have stopped his car before reaching the crossing. When the deceased got within about twelve feet of the track she looked round at him and his car, and continued so to look as she moved forward, until she reached a point about three or four feet from the track, when she stopped, still looking at the car. He thereupon threw off his brake, and "let the car drift along." When the car reached a point about six feet from the crossing, the little girl suddenly started to run across in front of it, and either tripped and fell or was knocked down by the car and run over. The moment he saw her make that start he jumped onto his brake with all his strength, and attempted to drop the fender, but missed the peg. The fender on the car was arranged either to be dropped by pressure on a pin in the platform or by coming in contact with any obstruction. He was not able to stop the car until it had run wholly across St. Patrick street. The only other eyewitness was a Mrs. Nau, sitting in a buggy on St. Patrick street, who estimates the distance of the car at the time the little girl started across Douglas avenue at some ninety feet from the crossing, and its speed at that time at about twelve miles an hour. She in no wise contradicts any of the other statements of the motorman, and confirms him in the statement that the little girl stopped at a point about three feet from the track, and then attempted to run across in front of the car. Her testimony is entirely indefinite as to the length of this stop. In response to plaintiff's counsel she said that she could not testify to the length of time, and in reply to cross-examination said that it was less than five seconds.

Another witness, not in sight of the crossing, looking out of a window further south, saw the car pass, and estimated its speed at sixteen miles per hour. Her line of vision is, by measurement, shown to have been limited at a point about seventy-three feet south of the crossing. She saw the motorman commence to apply his brake vigorously.

There is here disclosed no conduct from which the inference of negligence can be drawn. Conceding that, when the little girl was seen to start across the street, the motorman should have apprehended the probability that she would not exercise ordinary observation, care, or judgment, and might be in peril of collision, and that the duty rested on him to take all precautions to protect against such result, the evidence fails to show that he omitted any part of such duty. On the contrary, it establishes that he did take the ordinary and usual precaution of sounding his bell and applying his brake at a time and place when full control of his car was feasible and easy. It quite satisfactorily appears that but for the child's subsequent conduct no accident would have occurred. Certainly, there is no evidence that, up to the time the decedent stopped in her progress, the motorman omitted any precaution which might have affected the result. The burden of proof, of course, was on the plaintiff to prove negligence, and, in the absence of such proof, no inference or conjecture can be indulged. Commencing, then, at that point of time when the decedent stopped in a place of safety, looking directly at the car, and apparently for the very purpose of awaiting its passing, can negligence be predicated upon the fact that the motorman then allowed his car to proceed on its way, evidently with considerable speed? This depends on whether it is within reasonable probability that a five-year-old child, having full knowledge of the approach of a car, and having stopped apparently because of it, will suddenly run from a place of safety to a place of danger on the track. We cannot think

an affirmative answer possible. It would be much more in accord with probabilities that children playing in the street, in apparent oblivion of an approaching car, should suddenly dash in front of it; but that anticipation of such acts is not essential to due care in operators of street cars this and other courts have already decided. We suggest no doubt that, in operating street cars in places where children of tender age are known to be, due care or ordinary care involves a high degree of precaution, in contemplation of thoughtlessness and heedlessness; but common experience justifies the expectation that children of an age to be permitted to care for themselves upon city streets will exercise some measure of precaution when danger is actually observed by them. The case before us is distinguished from many which have found their way into the reports by the undisputed fact that the child saw the car; that she gave evidence by her conduct of appreciation of the danger in an attempt to cross in front of it, and of the exercise of judgment in deciding not to incur that danger, but to avoid it by the natural precaution of stopping short of the peril. In this respect the motorman's conduct is less open to any imputation of negligence than in most of the cases where it was decided that no inference against him could be drawn. *Eastwood v. La Crosse City R. Co.* 94 Wis. 163; *Holdridge v. Mendenhall*, 108 Wis. 1; *Chilton v. Central T. Co.* 152 Pa. St. 425; *Fleishman v. Neversink Mt. R. Co.* 174 Pa. St. 510; *Funk v. Electric T. Co.* 175 Pa. St. 559. No negligence being shown in thus proceeding to send his car onward past the child, none can exist in the subsequent conduct of the motorman. The injury was, then, due to her sudden and unexpected action, against which no acts of his could avail. The trial court rightly directed a verdict for defendant.

We discover no error in the several rulings on evidence assigned as such.

By the Court.—Judgment affirmed.

CASSODAY, C. J. I respectfully dissent in this case. There is evidence tending to show that when the little girl reached the sidewalk on the south side of St. Patrick street, and on the easterly side of Douglas avenue, the car in question was from 150 to 170 feet southerly from St. Patrick street, and the little girl was in plain sight of the motorman, who was, at the time, facing northward; that the little girl was then about thirty-two feet from the east rail of the defendant's track, and in the act of starting to go west across the track on the south sidewalk of St. Patrick street; that she was at the time less than five years of age, and unattended by any one; and that there was no team and no other person in the street to obstruct the vision of the motorman, and that he could stop his car by the brake alone in a distance of from sixty to 120 feet, and by the reverse current in a distance of not more than thirty or forty feet. In my judgment, the motorman was bound to know that the little child, under the circumstances, was practically helpless, and in imminent peril, and liable to go in front of the car, and hence the motorman was bound to have his car under such control as to avoid killing or injuring the child. Instead of doing that, he continued his car at such rate of speed that it ran from seventy to eighty feet after it struck the child, notwithstanding his admitted effort to stop it with the brakes. The fact that the child apparently saw the car when twelve feet from the track, and that it stopped three feet from the track, is, in my judgment, no excuse for continuing the car with such high rate of speed, especially as there is no evidence that the stop was for any perceptible length of time. It is well settled that "the question of negligence is for the jury unless, from the undisputed facts, the inference of negligence or its absence is inevitable." *Nelson v. C., M. & St. P. R. Co.* 60 Wis. 320; *Kaples v. Orth*, 61 Wis. 531; *Peterson v. Sherry L. Co.* 90 Wis. 92, and numerous other cases which might be cited. In my judgment,

there is more reason for holding that the motorman was guilty of negligence as a matter of law than for holding that the evidence is insufficient to take the case to the jury.

BRADER, Respondent, vs. BRADER, Executor, Appellant.

February 26 — May 21, 1901.

110	423
112	[2]507
110	423
113	[1]303
110	423
115	[2] 30
110	423
117	[1]474

Estates of decedents: Married women: Statute of limitations: Evidence: Transactions with person since deceased: Deeds: Promissory notes: Settlement: Parol evidence.

1. In transactions between husband and wife, the statute of limitations does not run against the wife. *Second Nat. Bank v. Merrill*, 81 Wis. 151, and *Fawcett v. Fawcett*, 85 Wis. 332, followed. CASSODAY, C. J., dissents.
2. Sec. 4069, Stats. 1898 (precluding a party from giving testimony in respect to transactions or communications by him personally with a person since deceased), does not extend to questions which call for information merely as to the witness's transactions with a third person, even though it may be argued, from the transactions between the witness and the third person, that certain acts were done by the deceased.
3. In an action to recover from the executor of plaintiff's husband certain sums, proceeds of property which belonged to her at the time of their marriage, which he afterwards collected and retained, it appeared, without objection, that a note, given for the purchase price of plaintiff's property, was drawn up by a third person in the presence of both herself and her husband. *Held*, that under sec. 4069, Stats. 1898, plaintiff's testimony that the note was given to her husband was inadmissible.
4. In such case plaintiff testified that a note belonging to her was settled and payment made to her husband in her presence, but that she did not participate in the transaction. *Held*, that the implication of authority given by her presence was a part of the transaction, and that, under sec. 4069, she was disqualified from testifying in respect thereto.
5. In such case plaintiff, after testifying that at the time of her marriage a certain note, part of her separate property, was in the

custody of her daughter, who brought it into the room where plaintiff and her husband were, and that they left the house soon after, was permitted to answer the question whether, after she left the house, she had the note in her actual possession. *Held*, error, since such testimony tended directly to establish a transaction between plaintiff and her husband.

6. Plaintiff also testified that she received a draft for $250 from her father's estate and kept the proceeds in her possession. Her daughter testified that on one occasion her father asked the plaintiff where she had certain money; that plaintiff replied that it was in her pocket; and that her father thereupon insisted that a more secure place was in his safe, to which her mother responded "Here it is." *Held*, that testimony of plaintiff that she never had that $250, or any of it, after that day, if relevant at all, related to a transaction with the deceased, and was therefore inadmissible.

7. Plaintiff deeded her farm for an expressed consideration of $2,000, then paid her by the grantee in the form of four promissory notes of $500 each. *Held*, that it might be shown by other evidence that such consideration also included a settlement of certain claims then existing between the parties, which were consistent with and did not contradict any effective part of the writing. CASSODAY, C. J., dissenting, is of the opinion that the deed and notes should be considered as one paper in law, signed by both parties, and conclusively presumed to include the whole agreement, and that evidence of contemporaneous agreements between the same parties was therefore properly excluded.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Plaintiff is the widow of the deceased, who died in February, 1899. They were married in January, 1872. She presented a claim for money had and received by the deceased: first, $1,150 from the auction sale of her household and farming effects and stock, held March 28, 1872; second, $30, proceeds of her wagon, sold and paid for April 1, 1872; third, $44, received for sale of hay on the last mentioned date; fourth, $300, proceeds of a promissory note of one Trevett, belonging to her, paid to decedent April 1, 1872; fifth, $48, proceeds of her promissory note against one Chandler received by the deceased April 1, 1872; sixth,

$250, moneys received by plaintiff from her father and handed to the deceased April 1, 1880. The answer was a general denial, statute of limitations, and an allegation that about December, 1872, a full accounting and settlement was had, covering all of the matters prior to that date, and covering a transfer of real estate owned by the plaintiff or by her children by a former husband, where it was agreed that the deceased should pay as full satisfaction and settlement the sum of $2,000, which was paid by the giving of his note for $500 to each of the four children of the plaintiff by her former marriage, all of which have been subsequently paid. Upon trial in the circuit court to a jury, a general verdict was rendered in favor of the plaintiff for the sum of $962.99, whereon, after motion to set aside the same and for a new trial based on the minutes of the court had been denied, judgment was entered, from which the defendant executor appeals.

G. S. Martin and *R. M. Bashford*, for the appellant.

For the respondent there was a brief by *F. J. & C. F. Lamb*, and oral argument by *F. J. Lamb* and *J. M. Olin*.

The following opinion was filed March 19, 1901:

DODGE, J. 1. One of the assignments of error most strenuously urged is that the trial court refused to hold the plaintiff's claim barred by the statute of limitations. Such refusal was predicated upon the view that such statutes do not run against a married woman upon claims against her husband. Were this question to be considered originally, it would seem clear that such position is not tenable. The terms of the statute of limitations are mandatory and comprehensive that "civil actions can only be commenced within the periods prescribed in this chapter" (sec. 4206, Stats. 1898), and that "actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued" (sec. 4219). Our statutes with reference

to the rights of married women have removed all disability, both of contract and suit, with reference to separate property, and have enabled the bringing of suits with reference thereto against the husband as well as another. *Carney v. Gleissner*, 62 Wis. 493. Hence it cannot be doubted that a cause of action accrues in favor of a married woman as against her husband at the same time and with the same completeness that it does against any one else. The limitation statutes make no exception in her favor, and, however wise exception might be on grounds of public policy, such wisdom is a matter for consideration by the legislature, and not for the courts, when the legislature has acted. However, a different view was taken in *Second Nat. Bank v. Merrill*, 81 Wis. 151, decided in 1891, where it was said definitely and unambiguously that statutes of limitation do not run against a married woman as between her and her husband. This was based upon considerations of public policy. "She ought not to be compelled to treat her husband as a stranger. Any other policy would beget disagreement and distrust." Again, in *Fawcett v. Fawcett*, 85 Wis. 332, it was clearly intimated that this rule was recognized as established, and further citations offered in its behalf. We do not find that the citations support the rule, but it is now ten years since it was definitely laid down as a judicial declaration of the force and effect of our statutes. During that time most valuable rights may have reached such age that their destruction would result from a change of that rule, and property rights of great magnitude may have grown up in reliance upon it. The fact that the community, doubtless upon the advice of the profession, have relied on the immunity of married women from the bar of statutes of limitation is confirmed by the fact that a suit with reference to an ordinary money demand by wife against husband has seldom been known in this court, numerous as are the transactions out of which such suits might grow. We feel constrained,

therefore, without yielding assent to the reason of the rule of *Second Nat. Bank v. Merrill*, to decline now to depart from it. If it is not such as the legislature believes best, a change by that body is easy, and that, too, in a way to take effect *in futuro* and not *ex post facto*. We therefore decide that no error was committed in holding the plaintiff's claims not barred by the statute of limitation.

2. Appellant assigns error upon the overruling of his objection to the competency of the plaintiff herself to give certain testimony on the ground that the same falls within the inhibition of sec. 4069, Stats. 1898, which, according to its terms, disables her to give testimony "in respect to any transaction or communication by her personally with the deceased." Among the questions, objections to which were overruled, are several which may be classed together, as resting upon the same principle. It having been testified that the deceased, Isaac G. Brader, superintended the auction sale of the plaintiff's property, the following questions were propounded to her:

"Did you yourself receive any money or notes received on the sale of that property that day?" "*Q.* Did any of the makers of notes then given ever pay any to you yourself?" "*Q.* Was it [a certain note of a third person] paid to you?" "*Q.* Did you ever receive any money from Dryden on that note?" "*Q.* After you were married to Brader, did you personally ever receive from Trevett anything in payment [of Trevett's note]?"

The trouble with these questions and their answers, uniformly in the negative, is that they were doubtless made the basis of argument to the jury for an inference that, if none of these payments of money or deliveries of notes were made to the plaintiff herself, the alleged payment of them to the deceased, Isaac G. Brader, was confirmed. Of course, the statute above cited has a clear and obvious purpose, which is to prevent the survivor to a transaction from benefiting by his own evidence thereto when the other party's mouth is closed by death as to a different version, and tes-

timony which with reasonable directness tends to establish that a transaction did or did not take place between the witness and the deceased is within the reason of the prohibition; but the connection must be reasonably direct, and we think it cannot be said to exist in the case of the questions above put, which called for information merely as to the witness's transactions with third persons. Possibly the appellant might have been entitled to some instruction from the court that proof that Trevett, for instance, did not pay his note to the plaintiff, must not be taken as tending to prove that he did pay it to the deceased,— a fact to which the plaintiff would probably not have been permitted to testify; but the fact that counsel may argue, from transactions between the witness and third persons, to an imaginary inference that certain acts were done by the deceased, is not enough to preclude her from testifying as to such transactions. Such was the extent of the evidence given under the questions above quoted.

Under the same objection to competency, it having appeared without objection that a wagon was sold to one Dryden at another auction, and a note drawn up by a third person in the presence of both plaintiff and her husband, the question was asked: "To whom was the note payable? *A*. To my husband." This was merely evidence as to the contents of a written paper, and seems not to be improper, within the rule of *Page v. Danaher*, 43 Wis. 221.

A further objection under this statute arose as follows: It having appeared that she owned a certain note against one Trevett, and that some business was transacted at Trevett's house, there being present herself, her husband, Trevett, and others, which transaction she says she "saw without in any way participating," the question was put and answered over objection:

"*Q*. State what that transaction was. *A*. It was settling that note that I had in my possession. Well, they had a final settlement of that note. They settled it up. Mr.

Brader took sheep, and there was some money coming, and it was paid over, and the note was all settled up. They exchanged, and Mr. Trevett paid Mr. Brader the money and the sheep, and Mr. Trevett received the note. *Q.* State whether or not, after this settlement with Trevett, you saw those sheep on this farm. *A.* I did. It was Mr. Brader's farm. He was carrying it on."

The rule of the New York decisions was adopted by us in *Wollman v. Ruehle*, 104 Wis. 603, 607, where it was stated that the statute "does not forbid testimony of transactions or communications between the deceased and third persons, though in the witness's presence, if he [witness] did not participate therein and they were not affected by his presence." This rule was also recognized and applied to exclude testimony in *Goerke v. Goerke*, 80 Wis. 520. The transaction testified to by plaintiff was the payment to the deceased of a note known by all parties to belong to the plaintff, in her presence, in which transaction she testifies that she did not participate. It is, however, inconceivable that her presence did not affect and influence the transaction. It doubtless served to authorize and justify her husband and the debtor in making the adjustment. No such settlement, to bind her, could have been made without either authority from her to her husband, which would have been a transaction between them, or such conduct on her part as to justify belief in such authority. A part of the transaction of the settling of that note between the deceased and Trevett was the implication of authority then and there given by her presence. It is plain that this transaction, to which she was permitted to testify, although between the deceased and a third person, was so influenced by her presence that she was in effect a party to it and should not have been permitted to testify thereto.

Another ruling in this category was substantially as follows: Plaintiff having testified that at the time of her marriage she had a certain note against one Trevett which was

in the custody of her daughter Sarah, and that just before she and her husband, Mr. Brader, left the house, the daughter, at her direction, brought the notes from her trunk into the room where plaintiff and her husband were, and that they left the house soon after, she was asked the following question: "*Q.* After you left the house, did you have the Trevett note in your actual possession?" And over objection she answered: "I did not." Either this testimony was wholly irrelevant and immaterial, or it tended very directly to establish a transaction between plaintiff and her husband. She had testified to the production of the note to both of them, and that without separation they both left the house together, and that never after that time did she have that note. It could have been offered for no purpose save as tending to establish that the note was delivered to her husband at that time, and that he never delivered it back to her, to neither of which facts was she a competent witness. We consider that this testimony transgressed the limitation, and that error was committed in its admission.

Still another assigned error of this class arose as follows: Plaintiff having testified to the receipt of a draft for $250 from her father's estate some time after her marriage, and that she cashed the draft and had the $250 in money in her possession, and there being evidence from a daughter, then a little girl eight years of age, that on a certain occasion she left her father and mother together in a room, and, after closing the door, listened at the keyhole and heard her father ask the plaintiff where she had certain money, and, on her reply that she had it in her pocket, heard him insist that a safer place was in the safe, to which her mother was heard to respond, "Here it is," the plaintiff was then asked, "*Q.* Did you have any other property or money at that time?" to which she answered substantially in the negative. She was also asked, "*Q.* Did you ever have that $250, or any of it, after that day?" This testimony also seems to be

so directly connected with a transaction between plaintiff and deceased as to be improper. Its only purpose was to show that in a transaction to which some one else had testified, such testimony being ambiguous as to what money was referred to, she had only the specific $250. It is certainly an attempt to prove by this witness that the $250 was the subject of the conversation between her and her husband overheard by the child; and the answer to the second question, if relevant at all, tended to justify an inference of its delivery to him at that time and a denial that he ever returned it to her. The objections to her competency to answer these questions should have been sustained.

3. An important ground of error assigned consists in several rulings of the trial court excluding all evidence to establish that at a certain alleged settlement the plaintiff, besides conveying land, settled and released all claim for these moneys in consideration of $2,000 then paid her by the decedent in the form of four promissory notes of $500 each, payable, respectively, to her four children by first marriage. Such testimony was excluded for the reason that at the time of the transaction the plaintiff executed and delivered a simple deed of conveyance of her farm expressing a consideration of $2,000, and the decedent executed the four promissory notes above described. The court considered these writings to purport to express the contract between the parties, and to render inadmissible evidence of any other, further, or different terms or subjects. The view adopted by the trial court has so recently received consideration and disapproval that no extended discussion is necessary. We have in two very late cases reiterated the well-established rule that neither a simple deed of conveyance nor a promissory note purports to express the whole contract between the parties. *Nauman v. Ullman*, 102 Wis. 92; *Cuddy v. Foreman*, 107 Wis. 519. The deed but purports to convey property in execution, partially or wholly,

of some agreement; and the promissory note merely serves as convenient evidence of a promise to pay money. Usually such instruments grow out of agreements having other elements than the mere conveyance or than the mere future payment of money, and therefore no presumption arises that the parties have attempted to embody their whole contract in either instrument. Counsel invokes the rule that, when writings are made, no elements of contract may be shown by parol, unless the writing itself discloses that it is incomplete and not intended to cover the whole agreement. That rule in no wise supports the ruling now under consideration, for by overwhelming consensus of authority it is established that a mere deed of conveyance or a simple promissory note does disclose on its face and by its very character that it is not an attempt to set forth the whole contract made. 2 Jones, Ev. § 446. Of course, the additional elements of contract which may thus be proved must be consistent with, and not in contradiction of, the effective part of the writing. For example, evidence would not be admissible of an extraneous agreement that the deed should not convey the property described, or that the money should not be payable at the time specified in a promissory note. *Gillmann v. Henry*, 53 Wis. 465. We do not understand that the evidence offered was obnoxious to this rule, however. The trial court seems to have been misled by *Hei v. Heller*, 53 Wis. 415. That case is, however, wholly distinguished from *Cuddy v. Foreman* and its line of authorities; for the document involved in *Hei v. Heller* was not a mere deed of conveyance, but, while containing effective words of conveyance, also proceeded to set forth terms of bilateral agreement on several subjects, and on its face evinced an attempt and intent to embody therein the contract made by the parties. The excluded evidence, considered generically and not in detail, should have been admitted, and its exclusion was error, obviously to the prejudice of the defense.

By reason of the errors already indicated, the judgment must be reversed, and it does not seem necessary to discuss the detail of several minor assignments of error, hardly likely to present themselves in the same way upon another trial.

By the Court.— Judgment reversed, and cause remanded for a new trial.

CASSODAY, C. J. I concur in the reversal of the judgment in this case for the improper admission of evidence; but in my opinion the cause of action is barred by the statutes of limitation, cited in the opinion filed. To my mind the cases of *Second Nat. Bank v. Merrill*, 81 Wis. 155, 156, and *Fawcett v. Fawcett*, 85 Wis. 332, are clearly distinguishable, for reasons stated by counsel for the appellant; but, even if this were not so, still I should feel bound to give effect to the statutes which are conceded to be so clear and unambiguous as to preclude construction. Courts are instituted, not for the purpose of making laws, but for the purpose of declaring what the law is; and an erroneous declaration as to what the law is does not, in my judgment, change the law, although it is binding upon the parties in the particular case. Such erroneous declaration of the law simply puts the court making it out of harmony with the law; and this is particularly so as to statutory law, when the statute is clear and unambiguous, leaving no room for construction. The legislature is expected to amend and correct statutes; but it can hardly be expected to review and correct erroneous statements of the law in judicial opinions, especially as such statements may at times be in direct conflict. To give force and effect to all such erroneous statements is in my judgment to bring the law into endless confusion.

I am further constrained to say that in my opinion parol evidence was properly excluded as to whether the property in question was included in the settlement of December 4,

1872. The deed signed by the one party, reciting a consideration of $2,000, and the four notes, of $500 each, signed by the other party, amounting to $2,000, should in my judgment be considered as one paper in law, signed by both parties, and hence as constituting the written agreement between the parties. *Gillmann v. Henry*, 53 Wis. 465, 468; *Herbst v. Lowe*, 65 Wis. 316. This being so, it necessarily excluded all contemporaneous agreements between the same parties in relation to the same subject matter or any part of it. Such written agreement is conclusively presumed to include the whole agreement. 1 Greenl. Ev. § 275; *Caldwell v. Perkins*, 93 Wis. 89. Such contemporaneous agreements are in my judgment excluded by the rule stated, although they may not contradict the written agreement.

Both parties moved for a rehearing.

For the appellant there was a brief signed by *R. M. Bashford*, and for the respondent there were briefs by *F. J. & C. F. Lamb*.

The motions were denied May 21, 1901.

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THE ELECTRIC APPLIANCE COMPANY, Respondent, vs. THE UNITED STATES FIDELITY & GUARANTY COMPANY, imp., Appellant.

March 22 — May 21, 1901.

Suretyship and guaranty: Municipal corporations: Liability for laborers' and materialmen's claims: Waiver.

1. Where a contract with a city for the erection of a lighting plant expressly stipulated that the bond to be given by the contractor for the faithful performance thereof should also be conditioned for the payment by the contractor of all claims for material and labor, the acceptance of a bond without such condition embodied therein is a waiver thereof.

2. Statutes giving a mechanic's lien do not extend to, and cannot be enforced against, the buildings and real estate of municipal corporations held for public use.
3. In such case where the contract provides that the plant shall be completed and ready for acceptance free and clear of all claims or liens for labor performed or material furnished, a materialman cannot maintain an action against a surety on a bond given by the contractor to the city for the faithful performance of his contract, the engagement of the surety being with the city and not with third persons.
4. To entitle a person to recover on an agreement between third persons there must not only be an *intent* to secure some benefit to him, but there must be a promise, legally enforceable.
5. Where a bond to secure a contract with a city for the erection and installation of a lighting plant was conditional for the faithful performance of the contract, and the contract provided that, before final payment by the city, the contractor should present receipts in full for all labor performed and materials furnished in the construction and installation of the plant, no action can be maintained on such bond where full payment was made in violation of such express stipulation of the contract.

APPEAL from an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

The defendant *The United States Fidelity & Guaranty Company* has appealed from an order overruling a demurrer to the plaintiff's complaint. The complaint was challenged on the ground that there was a defect of parties defendant, and that it did not state facts sufficient to constitute a cause of action. It appears that the city of Waupun was desirous of erecting a municipal lighting plant. Bids were invited, and on September 2, 1899, a contract was entered into between the city and the defendants Rockwell & Snyder to erect the same, and have it fully completed and ready for delivery on or before November 15th of that year. The contract stipulated, among other things, that the plant should be delivered "free and clear of all claims or liens for labor performed or materials furnished or otherwise," and that, before final payment should be made therefor or be deemed to be due on

said contract, the contractors should present to the city receipts in full for all labor performed and materials furnished in and about the construction and installation of the plant. It also provided that the contractors should furnish a bond in the sum of $20,000, conditioned for the faithful performance of the contract on their part, and for the payment by them of all claims for materials and labor. A bond was given by the defendant guaranty company conditioned that the contractors should "well, truly, and faithfully comply with all the terms, covenants, and conditions of said contract on their part to be kept and performed, according to its terms," subject to certain provisions now to be stated: The city was to notify the surety, in writing, of any act on the part of the contractors under the contract, which might involve a loss for which the surety might become liable, immediately after the occurrence of such act shall have come to the city's knowledge. In the event of a breach of any condition of the bond, the surety was to be subrogated to all rights of the contractors growing out of the contract, and all deferred payments or moneys thereafter to become due were to be credited upon any claim the city might make upon the surety because of such breach. Another condition was that the city should give the surety "due notice before the last payment under the contract herein referred to is made to the principal; otherwise, this obligation shall be void as to any liability of the surety hereunder." The complaint then sets out that, in order to carry out the contract, the contractors purchased merchandise and machinery of the plaintiff amounting to $2,396.79, which were used in the construction and equipment of the plant. The contractors have fully complied with the conditions of the contract on their part, except that they have not paid plaintiff's demands and the claims of others. The city has accepted the plant and paid the contractors therefor. It is further alleged that the surety was duly notified by the city of the

failure of the contractors to comply with the conditions of their contract as to the payments of said claim immediately after its breach, and immediately after the occurrence of such breach had come to the knowledge of the city, a copy of such notice being attached to the complaint. The prayer for relief is that plaintiff be subrogated to the rights of the city as against the other defendants, and for judgment against them for the amount of its claim. The bond in question runs to the city of Waupun and the state of Wisconsin, but, inasmuch as it does not appear that the state had any interest in the contract or any interest in the controversy, the case will be considered the same as though the state was not a party to such bond.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, attorneys, and *Dupee, Judah, Willard & Wolf*, of counsel, and an oral argument by *C. F. Fawsett* and *J. G. Flanders*.

For the respondent there were briefs by *C. E. Hooker* and *Ela, Grover & Graves*, and oral argument by *Mr. Hooker*.

The following opinion was filed April 9, 1901:

BARDEEN, J. If any liability exists on the part of the guaranty company, it must rest upon the fact that it has contracted with the city to pay the debt due from the contractors to the plaintiff. The demand to be subrogated to the rights of the city as against the contractors has no foundation to rest upon, because it affirmatively appears that the city has accepted the plant and paid the contractors therefor. The city has no claim against the surety, because it has suffered no loss, and has sustained no injury, by reason of the failure of the contractors to pay the plaintiff's claim. By reference to the contract, it will be seen that the contractors bound themselves to furnish a bond, not only for the faithful performance of the contract, but for the payment of all claims for labor and materials. The

bond accepted by the city omitted this latter provision, and was conditioned only for the performance of the contract. The contract was apparently drawn upon the theory that the city might be liable for the claims of laborers and materialmen. Such, however, is not the fact. In *Burnham v. Fond du Lac*, 15 Wis. 193, approved in *Buffham v. Racine*, 26 Wis. 449, this court held that a municipal corporation was not subject to the process of garnishment. Basing it upon grounds of public policy, and as being in harmony with the rule just stated, this court, in *Wilkinson v. Hoffman*, 61 Wis. 637, held that statutes giving a mechanic's lien did not extend to, and could not be enforced against, the buildings and real estate of municipal corporations held for public use. The rule was further extended in *Chapman V. Mfg. Co. v. Oconto W. Co.* 89 Wis. 264, by denying the right to a lien upon the property of a water company organized for the purpose of and under contract with a city for furnishing its water supply. The fact that the city expressly contracted that the bond given should be for the payment of materialmen and laborers, and then accepted a bond without such a condition, is clearly a waiver of that condition of the contract, and indicates an intention to abandon or relinquish its scheme in that respect.

But, it is urged, the contract says the plant shall be completed and ready for acceptance "free and clear of all claims or liens for labor performed or material furnished or otherwise." The plaintiff has a claim for material that has not been paid; hence there is a breach of the contract. Claims against whom? certainly not against the plant, because the law says that no such claim can exist. Therefore there was no breach of the contract on any theory that plaintiff's claim was one against the plant which the city was legally bound to discharge. Whatever may be the state of the law elsewhere, it is not believed that the cases in this jurisdiction will sustain the proposition that the third party can main-

tain an action against an alleged promisor based upon an implied promise to pay. The express promise, either by simple contract or covenant under seal, must exist. A few of the many cases in this state are as follows: *Kimball v. Noyes*, 17 Wis. 695; *Putney v. Farnham*, 27 Wis. 187; *Kollock v. Parcher*, 52 Wis. 393; *Johannes v. Phenix Ins. Co.* 66 Wis. 50; *Nix v. Wiswell*, 84 Wis. 334; *Fulmer v. Wightman*, 87 Wis. 573; *Morgan v. South Milwaukee L. V. Co.* 97 Wis. 275; *Stites v. Thompson*, 98 Wis. 329.

The surety's engagement in the bond was to pay to the city, and not to third parties. There are cases going to the limit of holding that, to entitle the third person to recover upon a contract made between other parties, there must not only be an intent to secure some benefit to such third person, but the contract must have been entered into directly and primarily for his benefit. *Parker v. Jeffery*, 26 Oreg. 186. An exhaustive note on the general subject may be found in 25 L. R. A. 257 [*Jefferson v. Asch*]. We consider the true rule to be that there must not only be an *intent* to secure some benefit to the third party, but there must be a promise, legally enforceable. The contract and bond in this case fail to meet these requirements. The situation presented shows a want of any intent to secure a benefit to third parties. When the city accepted a bond that did not attempt to secure the payment of materialmen, and which provided that the surety should be subrogated to the rights of the city in case of a breach and be entitled to credit on the claim of the city for all payments due the contractors thereafter to become due, this was inconsistent with the theory that it was the rights of third parties that were being secured.

There is, however, another branch of this case fatal to the plaintiff's alleged cause of action. The contract provided that, before the final payment should be made by the city or be deemed to be due, the contractors should present

receipts in full for all labor performed and materials furnished in the construction and installation of the plant. The complaint alleges that the contractors fully complied with the conditions of the contract, except the payment of plaintiff's claim and the claims of others, and that the city duly accepted the plant and paid the contractors therefor. No provision in the contract required any payment of the contract price until the work was completed and accepted. The city paid the contractors in full for the plant, and the inference is irresistible that such payment was made in defiance to the express terms of the contract that it should not be made until receipts in full had been produced. As said in *W. W. Kimball Co. v. Baker*, 62 Wis. 529: "It is elementary that sureties are favorites in the law, and have a right to stand upon the strict terms of their obligations when ascertained. Beyond the burdens thus taken upon themselves they are not bound." So far as anything appears in the complaint, the city had the entire contract price in its possession when the alleged notice was given. The surety had a right to rely upon the fact that the city would hold the contractors to strict fulfillment of their obligations. Any variance therefrom to the prejudice of the surety would work a discharge. This is elementary. That this stipulation was of importance to the surety admits of no doubt. That it was broken by the city is certain. No successful attempt can be made to resolve the undertaking of the surety into different factors, and say that they are independent, and one subsists for the benefit of this plaintiff, and another may fail because of the conduct of the assured. So far as this case is concerned, the obligation of the surety is a unit, and no liability can be predicated thereon except in accordance with the terms of the contract. This is not shown by the complaint, and hence this action cannot be maintained.

Our attention has been directed to several cases in Ne-

braska apparently sustaining the plaintiff's contentions. They go far beyond any case to be found in this court, and are based on premises we do not care to adopt. The case of *Baker & Co. v. Bryan*, 64 Iowa, 561, also cited by plaintiff, shows that the engagement of the sureties was that the contractor should "pay all claims for material, labor," etc. The court was of the opinion that the contract and bond indicated an intent to secure all persons furnishing labor and materials to be used in the construction of the building, and therefore held the sureties liable. We have arrived at the conclusion that the contract and bond in suit do not disclose an intent to secure third parties. We deem it clear, under the circumstances, that the bond was taken for the city's benefit, and this conclusion is amply confirmed by the practical construction given it by the parties.

By the Court.— The order appealed from is reversed, and the cause is remanded with directions to sustain the demurrer to the complaint and for further proceedings according to law.

A motion for a rehearing was denied May 21, 1901.

TECKTONIUS, Appellant, vs. SCOTT, Respondent.
SAME, Respondent, vs. SAME, Appellant.

April 15 — May 21, 1901.

Public policy: Agreement not to manufacture: Patents: Equivalents: Construction of adjudication of United States court: Right to manufacture equivalent: Contracts.

1. A provision in a contract, unlimited as to time, space, and extent of trade, by which one party binds himself and his heirs not to manufacture or sell any band-fastening device of any kind or character, except that covered by a certain patent, is unreasonable and void as against public policy.

2. Where a valid patent has been obtained, any improvement which performs the same functions by equivalent means is an infringement.
3. Where an investigation of a state of the art shows that a given patented invention is of a primary character, and the patentee is a pioneer in the field, a larger latitude is given to the doctrine of equivalents than if the art has been well explored, and a change of form or combination only is involved.
4. Where a person has a right under a contract to manufacture a patented device, he also has the right to manufacture its legal equivalent.
5. A judgment of a United States court adjudging that a band fastener manufactured by T. was an infringement of a patent belonging to S., in view of the opinion filed, is *held* to adjudge that T.'s device was an equivalent of that manufactured under S.'s patent. CASSODAY, C. J., and DODGE, J., dissent.
6. Where, after judgment in such case, S. sells his patent to T., but reserves the right to manufacture his invention, the manufacture by S. of the band fastener formerly manufactured by T. is not a violation of the contract. CASSODAY, C. J., and DODGE, J., dissent.

APPEALS from a judgment of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of defendant.*

This is an action in equity to declare forfeited a certain contract, and to perpetually enjoin the defendant from exercising any right or privilege thereunder. The contract in question was one whereby the plaintiff granted to the defendant the right to manufacture a patented appliance called a band fastener, which is a metal device for securing the ends of bands or hoops on wooden tanks, and tightening the same when desired.

The action was tried by the court. The evidence showed that October 16, 1888, the defendant, *Scott*, secured letters patent upon certain improvements in band fasteners; the same consisting of a pair of hollow metal castings or heads, with stationary crossbars therein, and with metallic grips loosely mounted therein, and a rod extending through one head and grip into and through the opposite head and grip; said rod having screw-threaded ends, with nuts thereon, so

that the ends of the bands, when inserted in each head, were gripped by bending or belaying the same over and under the crossbars of the head, and then the band could be tightened by screwing up the nuts upon the end of the rod. After procuring his patent, the defendant proceeded to manufacture the appliance at Racine, and built up a business therein, and the same was known to the trade as the "Scott lug." On March 20, 1894, the plaintiff obtained letters patent for certain improvements in band fasteners, whose general shape was quite similar to the defendant's appliance, and which consisted of a pair of hollow metallic tapering castings or heads, with flat base plates, but no crossbars, into which the ends of the bands were to be inserted and held in place by clamping wedges inserted into the tapering apertures of the heads; said wedges having transverse corrugations on the bottom surface, and being provided with a screw-thread bolt, with nuts, passing through the heads and wedges. After receiving his patent, the plaintiff proceeded to manufacture a lug called the "Tecktonius lug," claiming the same to be the same appliance covered by his patent of 1894. The lug or fastener so manufactured by the plaintiff, however, differed from the device described in his claim for the patent, in that the base plate was partly cut away, and one of the parts of such plate which was left was made with a rounding surface, by means whereof the band, after being introduced into the head, was bent or belayed in a somewhat similar fashion to the method described in the *Scott* patent. In 1899 the defendant, *Scott*, brought suit against the plaintiff in the United States circuit court for the Eastern district of Wisconsin, claiming that the device so manufactured by *Tecktonius* was an infringement upon his (*Scott's*) patent. This action was tried in due course, and resulted in a judgment holding that *Scott's* patent was valid, and that *Tecktonius* had infringed upon it by making and selling the device manufactured by him, called the "Tecktonius lug," and

granting a perpetual injunction against such manufacture. Upon pronouncing judgment, Judge SEAMAN, before whom the case was tried, rendered the following opinion:

"The defendant by his answer denies both infringement and the validity of the patent, and sets up prior patents and uses, by way of anticipation, and as showing the prior state of the art, as well. Infringement is the only issue which requires serious consideration, on the view I take of the undisputed testimony, and the inquiry as to infringement depends wholly upon the rule of construction which is applicable to the claims of this patent. The contention on the part of the defendant calls for a narrow rule, which would, in effect, limit infringement to the precise construction shown in the drawings and specifications, founding such views upon the terms of reference and limitation found in the claims, and upon the alleged slight advance over the prior art in the invention. If such is the rule which must be applied, it is manifest that the variations in the defendant's device are sufficient to avoid infringement.

"That there is patentable invention in the device described is not fairly disputable, upon the record. It is true that the elements which enter into the combination are not new, when separately considered, and that the use of a pair of lugs, of a threaded tie bolt arranged for tightening the band, and of other components of the device, were not novel in their application, in one form or another, to adjusting and fastening hoops or bands. But the novelty and merit of the combination clearly appear both in the ready adjustment by which the band can be applied, without requiring accurate measurement and preparation at the shops, and by which it is fastened by the mechanism of the lugs, without rivets or other means tending to weaken the band. Neither of these important results was accomplished or fairly approached in the prior art, and the accomplishment of both results by the means devised was a distinct advance in the art; and, unless this meritorious character of the invention is lost through terms of restriction in the claims of the patent, the invention is entitled to recognition for fair, if not liberal, construction. *Bundy Mfg. Co. v. Detroit Time-Register Co.* (C. C. A. 6th Circuit), 94 Fed. Rep. 524.

"In making the application for patent, the device and its purpose were well described, but the claims of invention

were not stated with desirable clearness and breadth. No limitation was imposed by action in the patent office, and I am satisfied, under the circumstances shown, that the set phrases of reference to the specifications must be held of such force as to limit the grant to the precise construction of each element as described, thus destroying any value in the patent, but am of opinion that a plain equivalent performing the same function in the combination is covered by the patent. So construed, it is clear that the defendant's device is a mere colorable deviation. Much stress is placed upon an asserted difference in principle,—that one holds the band ends by a 'bending grip,' while the other provides a 'friction wedge.' It appears to me sufficient that the 'bending grip' is produced by each, and necessarily so, from the form in which the head is made and used in each, the difference being in degree only.

"The patents issued to the defendant, and appearing in the record, are not referred to in the argument on behalf of the defendant, and I do not regard them as material.

"Decree will enter in accordance with the prayer of the bill."

Tecktonius appealed from this judgment, but said appeal was never brought to a hearing, because while the same was pending the parties settled the litigation and all matters in controversy, and *Tecktonius* paid *Scott* $3,000, and *Scott* made a deed of assignment of his patent to *Tecktonius*, and an agreement was made between the parties August 2, 1899, which, after reciting the issuance of the *Scott* patent, and the fact that *Tecktonius* had become the owner thereof, and *Scott* was desirous of acquiring a shop right therein, proceeded as follows:

"NOW, THIS INDENTURE WITNESSETH: that, for a valuable consideration to him in hand paid, the receipt whereof is hereby acknowledged, the undersigned, *Emil C. Tecktonius*, has assigned, sold, and set over, and by these presents does assign, sell, and set over, unto the said *John M. Scott*, the right, permission, and authority to manufacture and sell from a single shop, to be located at the city of Racine, Wisconsin, the invention described in said letters patent above referred to; such right to be personal to the said grantee

and his heirs, and to be otherwise nonassignable; provided, however, that nothing in this assignment and agreement shall be deemed to prevent the grantee from having such invention manufactured wherever the same may be done to his best advantage, and that, in the event that he shall remove from the city of Racine, the right hereby assigned shall follow his place of residence, and accrue to him and to his heirs for the life of said patent.

"And, in consideration of the grant hereinbefore set forth, said *John M. Scott* doth bind himself and his heirs to establish and always maintain a list and schedule of prices for band fasteners manufactured and sold by him under this license, at the rates, schedules, and discounts furnished to him on this day and on the 1st days of November, February, May, and August of each year during the life of this agreement; such rates and schedules to be based upon and to be the same as the rates and schedules established and used by the said *Emil C. Tecktonius*, grantor, in the conduct of his own business in the sale of said invention; said prices to be reasonable and profitable.

"And, furthermore, in consideration of its conveyance, the said *John M. Scott* promises and agrees to and with the said *Emil C. Tecktonius* that he will not, during the life of this agreement, enter into or engage in the manufacture of any band-fastening device of any kind or character whatsoever, other than that covered by the field of invention referred to and described in the letters patent hereinbefore referred to:

"Provided, however, that nothing herein contained shall affect the right of the said *John M. Scott* to manufacture and sell what are known as 'round iron lugs,' or to sell such lugs as he has heretofore manufactured and are now on hand.

"And it is further agreed, as liquidated damages between the parties to this agreement, that if the said *John M. Scott* shall at any time be guilty of a breach of this contract and agreement, or of any of its conditions, and fail to well and truly keep and perform all of the conditions herein contained on his part to be kept and performed, that he shall thereupon and thereby forfeit all of his right, title, and interest in and to the shop right hereby conveyed; and on the part of said *Emil C. Tecktonius* it is agreed that, if he shall fail to well and truly keep and perform the terms and con-

ditions of this agreement on his part to be kept and performed, that he shall forfeit to the said *John M. Scott* thereby the sum of five hundred ($500) dollars in cash."

At the time this agreement was made, *Scott* was manufacturing and selling at Racine a device known as the "Scott lug," in accordance with the claims of the *Scott* patent of 1888; and he continued so to do until December, 1899, when he commenced to manufacture and sell a band fastener identical in shape and construction with the lug manufactured by *Tecktonius* prior to the infringement action, and which was adjudged to be an infringement on the *Scott* patent; making the same with the words: "*J. M. Scott*, Racine, Wis. Patd. Oct. 16, 1888." Thereupon *Tecktonius* commenced this action, claiming that *Scott* had no right to manufacture such lug, and mark the same with his name; that he had forfeited his rights under the said contract by so doing, and was committing a fraud upon the plaintiff's rights by marking said lug with his own name, and was destroying the plaintiff's established business,— and prayed a forfeiture of all *Scott's* rights under said contract, and a perpetual injunction to prevent him from exercising any of such rights in the future. Upon these facts the court held that the contract provision whereby *Scott* agreed that he would not manufacture any band fastener other than that covered by the field of invention described in the patent of 1888 was contrary to public policy and void, and held, also, that defendant, *Scott*, had no right, under the agreement in question, to manufacture the so-called "Tecktonius lug," or to mark the same with his own name, and that the plaintiff was entitled to judgment enjoining the defendant from representing to the trade that he had such right, or that he had a right to mark such lug with his own name. Judgment being entered in accordance with these findings, the plaintiff appealed from that part of the judgment which holds that *Scott's* agreement not to manufacture any other band fas-

tener is void, as against public policy, and the defendant appealed from the remainder of the judgment.

For the plaintiff there were briefs by *Kearney & Thompson*, attorneys, and *H. G. Underwood*, of counsel, and oral argument by *Mr. Underwood* and *Mr. T. M. Kearney*. They contended, *inter alia*, that the contract was not void as against public policy. *Oregon S. N. Co. v. Winsor*, 20 Wall. 64–67; *Alger v. Thacher*, 19 Pick. 51; *Jones v. Lees*, 1 H. & N. 189; *Billings v. Ames*, 32 Mo. 265; *Vickery v. Welch*, 19 Pick. 523; *Leather C. Co. v. Lorsont*, L. R. 9 Eq. 345; Greenhood, Public Policy, 696; *Jarvis v. Peck*, 10 Paige, 118; *Alcock v. Gilberton*, 5 Duer, 76; *Nordenfelt v. Maxim-Nordenfelt G. & A. Co.* [1894] App. Cas. 535–575; *S. C.* 6 Eng. Rul. Cas. 413. Defendant should not be permitted to affirm the contract and at the same time question its binding force and validity. *Hunt v. Turner*, 9 Tex. 385; *S. C.* 60 Am. Dec. 167; *Manchester & L. R. Co. v. Concord R. Co.* 9 L. R. A. 689; *National W. P. Co. v. Hobbs*, 90 Hun, 288; *Flint v. Johnson*, 59 Vt. 190. The contract cannot be properly construed as unlimited in point of time or as to the territory to which it applies. *Curtis v. Gokey*, 68 N. Y. 300; *Hubbard v. Miller*, 27 Mich. 15; *Dethlefs v. Tamsen*, 7 Daly, 354; *Boardman v. Wheeler*, 27 Hun, 616; *Heichew v. Hamilton*, 3 G. Greene, 596. The defendant secured no right under the contract to make the "Tecktonius lug." *Woodworth v. Rogers*, 3 Woodb. & M. 135; *Pitts v. Wemple*, 6 McLean, 558; *Whipple v. Baldwin Mfg. Co.* 4 Fish. Pat. Cas. 29; *Blake v. Robertson*, 94 U. S. 728; *Star S. C. Co. v. Crossman*, 4 Cliff. 568; *Bachelder v. Moulton*, 11 Blachf. 304; *Hartz v. Cleveland B. Co.* 95 Fed. Rep. 681; *Nilson v. Morse*, 52 Wis. 240, 253; *Sigerson v. Cushing*, 14 Wis. 527; *Flint v. Johnson*, 59 Vt. 190; *Montpelier & W. R. R. Co. v. Langdon*, 45 Vt. 137; *Hicks v. Cram*, 17 Vt. 455.

For the defendant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. H. Remington* and *E. H. Bottum*.

WINSLOW, J. 1. We entirely agree with that part of the judgment of the trial court which holds that the contract provision by which *Scott* agreed that he would not, during the life of the agreement, engage in the manufacture of any band-fastening device other than that covered by the field of invention described in the *Scott* patent is void, as against public policy. It is well settled that such contracts are void unless limited, as to time, space, and extent of trade, to what is reasonable under the circumstances of the case, because they tend to deprive the public of the services of persons in those capacities in which they are most useful, and also tend to expose the public to the evils of monopoly. *Richards v. Am. D. & S. Co.* 87 Wis. 503. The restriction in the present case is an unlimited one as to space, and covers all states and countries. *Berlin M. Works v. Perry*, 71 Wis. 495. Even in cases where an established business is sold, and the vendor agrees not to engage in such business in the future, such agreement is only valid if confined to such limited time, and *within such limited territory*, as is reasonably necessary to protect the purchaser in the full enjoyment of the benefits of his purchase. *Palmer v. Toms*, 96 Wis. 367. In no view that we have been able to take of the case does the agreement before us, being unlimited as to territory, seem to be reasonable. *Gamewell F. A. T. Co. v. Crane*, 160 Mass. 50; *S. C.* 22 L. R. A. 673.

2. We are unable, however, to agree with the conclusion of the trial court to the effect that *Scott* violated his agreement or invaded any right of *Tecktonius*, by manufacturing the band fastener which forms the subject of this action. *Scott* sold his patent of 1888 to *Tecktonius*, but took back a contract giving him a right to manufacture and sell the invention described in it from a single shop in Racine. He then proceeded to manufacture a band fastener identical in shape, construction, and principle with the band fastener which *Tecktonius* had previously manufactured, and which

had been the subject of the previous litigation in the United States court. The result of this litigation is, of course, binding and conclusive upon both parties. In that litigation it was decided that the band fastener in question, which was then being made by *Tecktonius*, was an infringement upon *Scott's* patent. This might be so held without necessarily determining that *Scott* could manufacture it under his patent. Thus, if the *Scott* patent simply covered the grip feature, and the *Tecktonius* device embodied this in combination with some other new and patentable feature, it might, perhaps, be that a simple judgment of infringement should be construed as deciding only that *Tecktonius* infringed by incorporating the "grip" feature, and that hence the judgment was not a decision that *Scott* could manufacture the *Tecktonius* device under his patent. But the judgment must be construed in the light of the written opinion of the judge.

It is a well-settled principle of patent law that, where a valid patent has been obtained, any improved machine which performs the same functions by equivalent means is an infringement. Hall, Patent Infringement, §§ 162–186. Also, that where an investigation of the state of the art shows that a given patented invention is of a primary character, and the patentee is a pioneer in the field, a larger latitude is given to the doctrine of equivalents than if the art has been well explored, and a change of form or combination only is involved. Id. §§ 155, 156, 199, 201.

While, as an original proposition, it must be doubted whether the *Tecktonius* device was an equivalent of the device named in the *Scott* patent, still, if Judge SEAMAN so decided, it is conclusive on the parties here. Did he so decide?

Perusal of the opinion shows that he first considered the state of the art, and concluded that *Scott* was a pioneer in the art; that his invention was a distinct advance, entitled to fair, if not liberal, construction. Having so held, he

further held that, though the claims of the patent were not stated with clearness and breadth, still that "a plain *equivalent*, performing the same function in the combination, is covered by the patent. So construed, it is clear that the *defendant's device* is a mere colorable deviation." Here he evidently referred to the whole *Tecktonius* device. He calls it a "mere colorable deviation," which is a smaller and more restricted term than *an equivalent;* the term equivalent being evidently used by him in its technical patent law sense. It seems certain that he held the *Tecktonius* device to be an equivalent. This construction of Judge SEAMAN's judgment really ends the case upon this branch. The defendant, *Scott*, has an unquestioned right, under his contract, to manufacture the device that was covered and described by the patent of 1888; and, if he has the right to manufacture that device, he has the right to manufacture its legal equivalent, because that, also, is covered by the patent.

By the Court.—That part of the judgment appealed from by the plaintiff is affirmed, and that part of the judgment appealed from by the defendant is reversed, with costs, and the action is remanded with directions to render judgment for the defendant in accordance with this opinion.

CASSODAY, C. J. By dissenting in this case, I do not wish to have it understood that I claim that the decree of the federal court is not binding on this court. On the contrary, I have no doubt but that that decree, as to the questions covered by it, is conclusive upon the parties to this action. In fact, I so suggested on the argument, and have no reason to change my mind. But, in my judgment, that decree does not cover the question involved in this action. That action was commenced by *Mr. Scott* in the federal court January 28, 1898. It was an ordinary bill in equity to restrain *Tecktonius* from manufacturing and selling the "Tecktonius lug," so called, on the ground that it was an

infringement of the patent issued to *Scott* October 16, 1888, and numbered 391,340. *Tecktonius* answered by way of denying such infringement, and also by way of alleging that such patent so issued to *Scott* was invalid on the ground that he was not the original and first inventor of the device therein described, but that the same was covered by one or more of the prior patents therein alleged. The issues so joined were tried in the federal court, and an interlocutory decree entered therein July 24, 1899, wherein it was adjudged, in effect, that the patent so issued to *Scott* October 16, 1888, was valid; that the manufacture and sale of the "Tecktonius lug" by *Tecktonius* was an infringement of that patent; that *Scott* was entitled to recover the gains and profits which *Tecktonius* had made or received by reason of such infringement; and the cause was referred to ascertain the amount, and *Tecktonius* enjoined from further infringing such patent. In making such decree, the learned judge of the Eastern district expressly stated, in effect, that such infringement was the only issue which required serious consideration; that by a narrow construction of the *Scott* patent there would be no infringement, but that by a broad construction of that patent, as he felt bound to give it, there was an infringement. The validity of the patent issued to *Tecktonius* March 20, 1894 (being No. 516,690), was not involved in that litigation. True, the answer of *Tecktonius* in that action alleged "that all band fasteners made and sold by him were constructed under letters patent of the United States, and lawfully granted to him," but that was alleged solely by way of defense against the charge of infringement. In other words, there was no cross bill to determine the validity of the patent so issued to *Tecktonius*. The "Tecktonius lug" being an infringement of the *Scott* patent, as held by the federal court, the fact that *Tecktonius* obtained a patent on such lug nearly six years after the patent was so issued to *Scott* was no defense to the charge

of such infringement, even though it was a valid patent. Accordingly, Judge SEAMAN stated in his opinion that "the patents issued to the defendant [*Tecktonius*], and appearing in the record, are not referred to in the argument on behalf of the defendant [*Tecktonius*], and *I do not regard them as material.*" Thus it appears that the decree was made in the infringement suit without regard to the question whether the patent so issued to *Tecktonius* March 20, 1894, was valid or invalid. In other words, the federal court did not pass upon, nor attempt to pass upon, the validity of that patent. Such validity was not involved in that action, and, of course, could not legitimately be determined in that action. After the entry of that decree, and after *Tecktonius* had appealed therefrom, and on August 2, 1899, the parties settled the litigation and all matters in controversy between them. In such settlement *Scott* sold and assigned his patent to *Tecktonius*, and the latter paid him therefor $3,000, and gave back to him a shop right of what was so covered by the patent so issued to *Scott* October 16, 1888, as appears in the agreement copied into the opinion filed by my brother WINSLOW. That agreement, as I understand, is construed by all the members of this court as only covering such shop right as *Scott* previously held under his patent. In other words, by that agreement *Tecktonius* parted with no property or rights of property which he possessed, if any, under his patent prior to his purchase of the *Scott* patent, and *Scott* obtained no property or property rights thereby which were not covered by his patent so assigned to *Tecktonius*. *Scott* thereupon continued to manufacture and sell the device described in the patent so issued to him October 16, 1888, until in December, 1899, and then, for the first time, commenced to manufacture and sell the device described in the patent so issued to *Tecktonius* March 20, 1894. January 5, 1900, *Tecktonius* commenced this action to restrain *Scott* from such manufacture and sale of the device so described

in his patent, on the ground that he had no right to the same under such agreement, and also to cancel and set aside so much of that agreement as secured to *Scott* such shop right. The question recurs whether the patent so issued to *Tecktonius* is a valid, subsisting patent; and, if so, then were the property and rights of property thereby acquired by *Tecktonius* determined and extinguished by the decree in the federal court? As indicated, the validity of the patent so issued to *Tecktonius* was not involved in or questioned in the infringement suit, otherwise than that the device therein described was held to be an infringement of the *Scott* patent; nor is it otherwise questioned in this action. The granting of "a patent is *prima facie* evidence that the patentee was the first inventor, and casts upon him who denies it the burden of sustaining his denial by proof." *Smith v. Goodyear D. V. Co.* 93 U. S. 486; *Lehnbeuter v. Holthaus*, 105 U. S. 94; *Morgan v. Daniels*, 153 U. S. 120, 123. The fact that, a short time after making the agreement mentioned, *Scott* commenced the manufacture and sale of the device described in the patent so issued to *Tecktonius*, is evidence to be considered in determining the validity of that patent. *Smith v. Goodyear D. V. Co.* 93 U. S. 495, 496; *McGowan v. N. Y. B. & P. Co.* 141 U. S. 332, 343; *Barbed Wire Patent*, 143 U. S. 285.

"Two machines or devices are substantially identical when they perform substantially the same thing in substantially the same way to obtain the same result; and they differ from each other, in the sense of the patent law, when they perform different functions, or in a different way, or produce substantially different results." *Cantrell v. Wallick*, 117 U. S. 689.

In that case it was also held that:

"Two patents may be valid when the second invention is an improvement on the first, and, if the second includes the first, neither patentee can lawfully use the invention of the other without his consent; but a stranger sued for infringing the second patent cannot defend by setting up the existence of the first patent."

So it has been held that:

"The inventor of an improvement has a right to his own improvement. The original inventor cannot use the improvement because it is ingrafted upon his invention." *Whipple v. Baldwin Mfg. Co.* 4 Fish. Pat. Cas. 29.

That the "Tecktonius lug" was a patentable device, notwithstanding the prior patent so issued to *Scott*, is manifest, in the broad difference in the claims of the respective patents; for it is a well-established rule of patent law that, "where a specific device or combination is claimed, the nonclaim of other devices or combinations apparent on the face of the specification is, in law, so far as the patentee is concerned, a dedication of them to the public, and will so be enforced, unless he with all due diligence surrenders his patent for reissue, and proves that his omission to claim them arose wholly from inadvertence, accident, or mistake." *Miller v. Brass Co.* 104 U. S. 350; *Mahn v. Harwood*, 112 U. S. 354, 362, 363.

The claims for the *Scott* patent are:

"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is: (1) The herein described *clamp* for uniting the ends of hoops or bands, or tightening the same, consisting of a pair of heads recessed and apertured as set forth, and provided with crossbars, grips loosely mounted therein, and a rod extending through one head into and through the opposite head, having screw-threaded ends, with nuts thereon, substantially as described. (2) The herein described *clamp* for uniting the ends of hoops or bands, or tightening the same, consisting of a pair of heads enlarged at one end and reduced at the other, having apertures and recesses therein, and crossbars, as set forth, the grips loosely and removably mounted in said heads, and having enlarged outer ends and inner concave downwardly projecting ends, with a smooth-bored aperture passing there through, and the threaded rod or bolt passing through said head and nuts, substantially as described."

The claim for the patent issued to *Tecktonius* is:

"Having thus described my invention, what I claim as new, and desire to secure by letters patent, is: The combi-

nation with a band of a pair of hollow, tapered metallic castings, having flat base plates, adapted to receive the ends of the said band, *tapered longitudinally perforated clamping wedges*, whose upper portions coincide in shape with the under surface of the tapered under wall of said castings, and having tapered undersides formed with series of transverse corrugations, and a coupling bolt passing through and connecting the said clamping wedges, and provided with suitable tightening nuts."

To my mind it is very clear that the evidence sustains the findings of the trial court to the effect that *Scott* violated his contract with *Tecktonius*, and in December, 1899, and since, wrongfully manufactured and sold the device described in and covered by the patent so issued to *Tecktonius*, and hence should be held liable in this action.

DODGE, J. I concur in the foregoing dissenting opinion of the chief justice.

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WILLIAMS, Appellant, vs. THE J. G. WAGNER COMPANY, Respondent.

April 30 — May 21, 1901.

Master and servant: Personal injuries: Exposed machinery: Assumption of risk.

1. Plaintiff, thirty-six years of age, a competent machinist of fifteen years' experience, was injured by reason of the exposed condition of certain gears on a machine which he had operated for eight months. He testified that he knew the machine and its several parts thoroughly, and that the revolving gears were in plain view at all times. *Held*, that he assumed the risks resulting from the uncovered gears. *Nadau v. White River L. Co.* 76 Wis. 120, and *Darcey v. Farmers' L. Co.* 87 Wis. 245; *S. C.* 98 Wis. 573, distinguished.

[2. Whether, under sec. 1636*j*, Stats. 1898, defendant was negligent in not covering the gearing, not decided.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action to recover for personal injuries. The evidence shows that the defendant is a corporation manufacturing bridges and structural iron work at Milwaukee; that in April, 1897, the plaintiff, who was then a man nearly thirty-six years of age, commenced to work for the defendant in its shop at Milwaukee, and continued so to work until January 31, 1898, when the accident happened of which he complains; that for five or six weeks he worked as helper about the shop, and was then put in charge of a Bryant metal-sawing machine which he operated up to the time of the accident; that this machine was a machine used to cut iron and steel beams according to marks previously made upon them; that it was driven by an electric motor which was placed in a covered box at one end of the machine; that the machine itself was about ten feet in length, exclusive of the motor box, two and one-half feet in width, and two feet in height from the floor on which it rested; that the motor box was twenty-three inches high, two feet wide, and twenty-eight inches long, and that between the machine and the motor box there were four geared cogwheels, running in mesh, which served to reduce the speed of the machine and give it strength, the wheels being in two pairs, each consisting of a large and a small wheel; that the distance between the cogwheel nearest the electric motor at its lowest point and the bed of the machine is about three inches; that the wheels all revolved vertically, and turned from the inside upward, and were not covered in any way; that the machine itself rested on a bed of planks about twelve feet long, forming a sort of platform, which was above the floor of the shop about four or five inches, under the body of the machine, and about two inches under the motor box and the gears, which platform extended out upon the east side of the machine far enough to make a passageway over which

the plaintiff and many of the defendant's other employees passed many times daily; that the plaintiff's duties upon this machine were to cut steel beams according to marks previously made, said beams being placed on a movable table at the south end of the machine in front of the saw, also to keep the machine clean and in order, and oil the same, and to turn the electric power on or off from the motor as required; that on the day of the accident the plaintiff was cutting a channel sixteen or seventeen inches in width, which had been placed in position on the movable table and clamped down; that he turned on the power, and, standing on the west side of the machine, watched the cutting for about fifteen minutes, and then turned and walked around the north end of the machine, where the motor box was, and to the east side of the machine, where, standing upon the platform, he watched its operation for about five minutes; that he then turned back, and noticing a spot upon the motor box, he stopped to wipe it off with some waste which he had in his hand, when, as he testifies, the motor box moved slightly, and "I must have slipped on that corner here, and I fell right over" (apparently meaning the corner of the plank platform under the machine); that he fell lengthwise along the east side of the machine, and that in some way his right arm was drawn into the gear of the wheel nearest the motor box, probably by the sleeve of his sweater catching on the cog, and his right hand was thus drawn into the gears and practically cut off. The plaintiff testified that he had never been cautioned as to the danger about those gears. There was also evidence to the effect that gearing of this kind could be covered without impairing its usefulness, and that such gearing upon similar machines was covered in some other establishments in Milwaukee. It appeared by the plaintiff's own evidence that he learned the blacksmith trade in Germany; that when he was twenty years of age he came to this country, and worked

in various mines, yards, and shops, doing all sorts of helping, blacksmithing, and common labor; that he worked in railroad shops at Chicago, Bloomington, and Milwaukee, also at a number of private machine shops in Milwaukee, in all of which machinery was employed; that when he went to work for the defendant he told the foreman that he was handy in a blacksmith shop or in a machine shop, and that the foreman put him at work helping, fitting bridges together, etc., for five or six weeks, when the foreman took him to this machine, and showed him how to operate it, and from that time until he was injured he worked on this machine about half of the time, and the rest of the time when the machine was not running, at helping around the shop; that he saw the gears in question as many as fifty or sixty times a day; and that the machine was not changed any from what it was when he first went to work. At the close of the plaintiff's evidence a verdict for the defendant was directed, and the plaintiff appeals from judgment thereon.

For the appellant there was a brief by *O'Connor, Hammel & Schmitz*, and oral argument by *A. J. Schmitz.*

For the respondent there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter.*

WINSLOW, J. It may be conceded, for the purposes of this case, that the defendant was negligent in not covering the gearing in which the plaintiff's hand was crushed (Stats. 1898, § 1636*j*), although this point admits of grave doubt and is not decided. Even if such a concession be made, however, it must be held, on the undisputed facts, that the plaintiff assumed the risks, whatever they were, resulting from the uncovered gears. He was a man of more than thirty-six years of age, who since his boyhood had worked in and about shops full of machinery. In his own words, he was "handy in a machine shop and all around." He had operated this very machine for at least eight months, and

knew every part of it thoroughly. The revolving gears were before his eyes almost constantly, and it would be idle to say that he did not know and appreciate the dangers which lurked about them as well as anybody could know them. If there was danger of falling into them or under them, or of catching his clothing in them, none could know it better than he. He was not a thoughtless and immature boy, but a man possessed of all his faculties, and with at least fifteen years of experience in and about machine shops. To say that he could not know or appreciate the dangers, and that his employers could appreciate them, is little less than absurd. The cases of *Nadau v. White River L. Co.* 76 Wis. 120; and *Darcey v. Farmers' L. Co.* 87 Wis. 245; *S. C.* 98 Wis. 573, are confidently relied upon to justify the submission of the present case to the jury. Examination of those cases, however, shows that they are materially different from the present case. In both of those cases the dangerous appliances which inflicted the injuries were not connected with the machines about which the plaintiffs were working, and were wholly or partially concealed from view while the plaintiffs were engaged in their ordinary duties. Whatever may be said as to the principles upon which those cases were decided, they do not go far enough to justify a recovery in the present case, where the injury resulted from an appliance which was a part of the machine where the plaintiff had worked for months, and which was in plain view at all times.

By the Court.— Judgment affirmed.

POWALSKE, by guardian *ad litem*, Appellant, vs. CREAM CITY BRICK COMPANY, Respondent.

110 461
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April 30—May 21, 1901.

Master and servant: Personal injuries: Unguarded machinery: Statutes: Nonsuit.

1. Sec. 1636*j*, Stats. 1898 (providing, among other things, that the owner or manager of every place where persons are employed to perform labor shall securely guard or fence all shafting which is so located as to be dangerous to employees in the discharge of their duty), plainly contemplates that the persons mentioned shall exercise ordinary judgment in determining whether machinery should be guarded, and that, in such exercise, they shall bring to bear upon the subject ordinary prudence under the circumstances of each particular case.
2. Where shafting is so located that an employee must necessarily go out of his ordinary course, or any course which he might reasonably be expected to take, in order to reach it, ordinary care and prudence on the part of the master does not require it to be guarded.
3. The question whether a shaft is dangerous in an unguarded condition, within the meaning of sec. 1636*j*, is not to be determined or necessarily influenced by the mere fact that an employee was injured thereby.

APPEAL from a judgment of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Affirmed.*

At the time of and for a considerable period before the occurrence complained of, defendant was a manufacturer of brick and plaintiff was one of its employees. A part of the brickmaking plant consisted of a building, in which was located, near the north end, a machine called a "crusher," through which the clay was put before being made up into brick. The clay was conveyed to the crusher in this way: In the north end of the building was an opening five feet square, the lower side of which was at the surface of the ground. The clay bank was about 200 feet north of such opening, and a roadway led from one to the other. Two

one-horse dump carts were used, attended by a boy. There was a horse for each cart. The boy would locate one of the carts at the clay bank, and when it was loaded drive it to the opening, there discharge the load, and then return to the clay bank, take the other horse and repeat the operation, and so continue the work during the day. He was required to be very active in order to keep the crusher supplied with clay. As he approached the vicinity of the opening with his horse and dump cart, he would turn halfway around and back the cart up so that the tail end thereof would be inside the opening. He would then descend from the cart on the west side thereof, and release the cart box so as to admit of its being tipped up. He would then go to the back end of the cart and take out the tail board or receive it from the man inside the building. If the cart box did not then readily tip up so as to dump the clay or permit of its being removed from the box readily by the man inside the building, the boy would go to the front end of the cart and lift on the box sufficiently to tip it up. The lower side of the wheels of the cart, when it was in position at the opening, were below the surface of the ground outside the cart track. On the west side of the cart and along the line where the boy was required to travel in going to the opening to remove the tail board or receive it as before indicated, was an accumulation of small stones and other rubbish. Such accumulation was from one and one-half to two feet deep in the pathway and sloped upward to the west to a height of four or five feet. The stones, of which the refuse was mainly composed, had been picked out of the clay by the man inside the building and thrown through the opening. The form of the stone pile was such that there was a tendency of the stones to roll down into the pathway. The stones were slippery from the damp clay, so that as the boy walked over them he was in danger of slipping and falling. About three feet west of the opening

and one foot above the level thereof, the driving shaft, from which was belted the machinery inside the building, protruded through the end of the building about two feet. Such shaft was about two and one-half inches in diameter. It revolved very rapidly when driving the machinery. It was put up in the manner indicated for convenience in repairing it in case of a breaking thereof, the idea being that the fractured end could be cut off and the shaft moved south without taking it out of its bearings. As the boy walked by the west wheel of the cart to remove or receive the tail board as indicated, the west side of his body approached to within about eighteen inches of the revolving shaft, which was at that point about opposite his breast. He had no occasion to move nearer to the shaft than that in the course of his work, and no occasion to use his hands in that direction unless to save himself in case of slipping on the stones.

Plaintiff, a lad fifteen and one-half years of age, was, on September 19, 1897, in charge of the delivery carts. He was a boy of moderate intelligence, having attended school considerably, though he was a dull scholar, and was a boy of considerable experience as a laborer. Previous to the day in question he had been employed about the brickyard in various capacities suitable for one of his age, the last being that of driving a team to deliver brick to customers. On the morning of the day named, for the first time, he was set to work with the delivery carts. He was obliged to leave his horse occasionally, after placing the cart in position at the opening, to do other work. One of the horses was troublesome at such times, in that he would not stand quietly, but would go forward and otherwise move about. To obviate that difficulty plaintiff requested the foreman to give him a rope, and was thereupon directed to procure one that was on a shelf just inside the opening. He used the rope by tying one end to the ring of the bridle bit and the

other to a stone after placing his horse in position for the clay to be unloaded. During the noon hour, to facilitate the operation of tying the horse, plaintiff made a hook out of a piece of wire and tied one end of the rope to that, and took an old tin pail, filled it with stones, tied a canvas over the top, and tied the other end of the rope to the bail thereof. Thereafter, when he placed his horse in position for clay to be unloaded, he would engage the hook with the ring of the bridle bit. The foreman observed the way plaintiff was using the rope. About four o'clock in the afternoon, the man inside the building complained that clay was not coming fast enough, whereupon plaintiff resolved to give his undivided attention to that business, which rendered further use of the rope unnecessary. Thereupon he removed the rope from the pail and proceeded with it, on the west side of the horse and cart, to the opening, for the purpose of replacing it on the shelf from which he obtained it. As he proceeded he was engaged in winding the rope in a coil around his wrist. As he arrived at the opening he caught the rope sufficiently near the loose end to enable him by a single movement to place it on the shelf, at which instant he made an involuntary movement in some way, whereby the end of the rope was thrown up and carried by the wind, which was blowing briskly, west against the shaft, which instantly caught it and wound it up so rapidly that he was unable to disengage his arm therefrom. The result was that he was drawn to the shaft and revolved around the same and severely injured. This action was brought to recover compensation for such injury. The breaches of duty on the part of defendant, complained of, were failure to warn plaintiff of the danger to be apprehended from the shaft, failure to furnish him with a suitable rope for tying the horse,—the one furnished him being frayed at the end so as to be liable to be carried about by the wind,—and failure to box the end of the shaft. The evidence tended to establish,

or established without controversy, the facts detailed. At the close of the evidence the court granted a nonsuit, and plaintiff appealed.

For the appellant there was a brief signed by *H. K. Curtis* and *Sam'l Rosendale*, attorneys, and *Sam'l Rosendale*, of counsel, and oral argument by *Mr. Rosendale*.

For the respondent there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter*.

MARSHALL, J. Though the complaint charges respondent with three distinct breaches of duty, it is not claimed that any was established by the evidence except that involved in the question of whether the unguarded shaft was so located as to be dangerous to appellant in the performance of his duty as one of the respondent's employees. Sec. 1636*j*, Stats. 1898, provides that, "The owner or manager of every place where persons are employed to perform labor shall securely guard or fence all . . . shafting . . . which is so located as to be dangerous to employees in the discharge of their duty." Now, if it would not be reasonable to say, on the facts of this case, that the shafting in question was so located that respondent, in the exercise of that care for the safety of its employees which is contemplated by the statute, ought to have apprehended that it might probably cause a personal injury to some one of them, appellant's case failed at the very outset. The statute does not require every shaft in a factory to be guarded or fenced, but only such as are so located as to be dangerous to employees in the discharge of their duties. It does not hold the owner of a factory, where machinery of the kind it mentions is used, bound to anticipate every possible danger to his employees that may in any event exist therefrom by reason of its being unguarded. The statute must have a reasonable, sensible construction. It plainly contemplates that persons required to comply with its provisions shall exercise ordinary judgment

in determining whether machinery should be guarded, and that, in such exercise, they shall bring to bear upon the subject ordinary prudence and intelligence under the circumstances of each particular case. So, whether the shaft in question was dangerous in its unguarded condition, within the meaning of the statute, is not to be determined or necessarily influenced by the mere fact that appellant was injured thereby. If it had been located several feet above appellant's head as he was about his work, it would still have been possible for him to have been injured by it in many ways that might be imagined. The question is, Would a person of ordinary intelligence and prudence, circumstanced as defendant's officers or those having charge of its business were, have apprehended that the unguarded shaft might probably cause a personal injury to some employee while in the discharge of his duties? If not, then the failure to guard it was not a breach of duty to appellant; and if the circumstances of the case upon which the conclusion must turn were, upon the evidence, so clearly in favor of respondent as not to reasonably admit of a finding to the contrary, manifestly it was free from the charge of actionable negligence upon which appellant contends the case should have been submitted to the jury, and the nonsuit was properly granted.

It is said that the question of whether the shaft should have been guarded was for the jury. Expressions to that effect may readily be found in legal opinions, but the authors thereof anticipated that they would be read in the light of settled principles of law. This language was used in *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482. "Whether the statute requires such machinery to be covered or guarded depends upon whether it is 'so located as to be dangerous to employees when engaged in their ordinary duties.' . . . That is a question of fact for the jury." Manifestly, the court was speaking with reference to the evidence in that

case. As a general proposition, such a question is to be solved in the same way as any other question of fact. In this case, if the evidence showed that the unguarded shaft was so located as to be dangerous to employees in the discharge of their duties, with such clearness that reasonable minds could not reasonably differ in respect thereto, it was for the court to solve the question at issue as one of law, and the same is true if the unguarded shaft was shown to have been so located as not to be dangerous to employees while in the discharge of their duties, with such clearness that reasonable minds could not reasonably differ in regard thereto. It is the duty of the court, where such a question is presented, upon motion therefor, to decide whether there are conflicting reasonable inferences from the evidence as to where the truth lies, and, upon a decision in the affirmative, to send the case to the jury to decide which is the proper inference to be drawn. The court has no right to refuse to judicially determine the first question suggested, and no right to go further and invade the province of the jury by passing upon the second question mentioned. Here the court decided that there was no room in the evidence to reasonably decide but one way, as to whether the statute required the shaft to be guarded; and that decision, and the result of it, must be sustained unless we can say that it is clearly wrong. *Powell v. Ashland I. & S. Co.* 98 Wis. 35; *Dewey v. C., M. & St. P. R. Co.* 99 Wis. 457; *Maanum v. Madison*, 104 Wis. 272.

It seems to us, the rule applies to the facts of this case, that, where a danger is so located that a person must necessarily go out of his ordinary course, or any course which he might be reasonably expected to take, in order to reach it, ordinary care and prudence on the part of another, who is in duty bound to guard him from personal injury within the scope of the risk to be reasonably apprehended therefrom, does not require it to be guarded against. *Gorr v. Mittlestaedt*,

96 Wis. 296. That rule is most often applied in highway cases, but the principle involved reaches every case where duty on the part of one person to guard the personal safety of another is restricted to such dangers as such other is reasonably liable to come in contact with in the ordinary course of events, within particular limits. In *Hadley v. Taylor*, L. R. 1 C. P. 53, Mr. Justice WILDE stated the rule as to highways in substance thus: Whether a dangerous place near a highway renders it unsafe for public travel depends upon whether a person may be injured thereby from an accident happening on such highway, or whether he must wander from the way to reach such danger.

Now it is clear that appellant's employment did not bring him within the region of danger from the unguarded shaft. The nearest that any one could reasonably have expected his person, as he moved about his work, would probably come to the shaft, was about eighteen inches, at which point it was west of and about on a level with his breast. When he was so located, a movement directly towards the shaft was quite well guarded against by the large pile of stones under it, which sloped from the pathway along the west side of the cart upward and westward to the height of some four feet. The only way he could reach the shaft was by stepping out of the path and up on the pile of stones. There was no occasion whatever for him to do that. The form of the stone pile and the character of the stones were such that to advance towards the shaft was a somewhat difficult feat. If we admit that the danger of slipping on the stones that were in the pathway, and falling, should be considered, then it seems plain that the location of the shaft was such that the danger of a person, circumstanced as appellant was about his work, reaching the shaft in that way, was so remote as to be regarded as only within bare possibilities,— not an event within reasonable probabilities. In case of one so circumstanced slipping and falling, his course would be down-

ward, and if, in any event, it were also sideways towards the shaft, there would be no danger reasonably to be apprehended of his coming in contact with it. He would fall against the sloping side of the stone pile without reaching the shaft. We are unable to imagine any movement that it could reasonably have been apprehended appellant might probably make in the course of the ordinary discharge of his duty, that would bring him in contact with the shaft or within the region of danger therefrom. The connection was made, between him and the danger which caused the injury, by means of the rope that he, in some way, swung around so that the end of it was caught by the shaft. Just how that was done does not satisfactorily appear. It does not even appear so that any one could say, from the evidence, with reasonable certainty, how it probably occurred. Appellant was not able to explain it with any reasonable degree of definiteness. It is sufficient for the purposes of this case, however, that it clearly appears from the evidence that in the ordinary course of events appellant could not reasonably have been expected to be in danger of in any way coming in contact with the unguarded shaft. It necessarily follows that it was not required to be guarded, and the nonsuit was properly granted.

By the Court.—The judgment is affirmed.

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115 [6]288
60 LRA 413

DAVELAAR, Assignee, Respondent, vs. BLUE MOUND INVESTMENT COMPANY, imp., Appellant.

April 30 — May 21, 1901.

Execution: Seal: Amendment nunc pro tunc: *Return: Presumptions: Practice: Corporations: Insolvency: Sequestration proceedings: Receivers: Appointment without notice.*

1. Under sec. 2830, Stats. 1898 (providing that the court may, at any stage of the action, in furtherance of justice and upon such terms as may be just, amend any process, etc.), where an execution was issued out of the superior court of Milwaukee county, but by mistake the seal of the circuit court for that county was affixed, it is not error to permit the amendment thereof by affixing the proper seal. *Corwith v. State Bank*, 18 Wis. 560, followed.
2. In such case it is not error to allow such amendment on the hearing of a motion by the execution debtor to vacate proceedings under the writ, where the objections to the proceedings attacked covered other grounds than the defect in the execution, and the irregularity was not mentioned in the moving papers. *Bonesteel v. Orvis*, 23 Wis. 506, distinguished.
3. Where on a judgment against a corporation and another the execution had been returned unsatisfied as to the corporation, and the judgment creditor, acting under sec. 3216, Stats. 1898, procured the appointment of a receiver for the corporation, the creditor is strictly within his legal rights, although it does not appear that he has exhausted his remedies against the other judgment debtor.
4. The fact that an execution against a corporation was returned the same day it was issued, and sequestration proceedings were immediately commenced against the corporation, does not warrant the presumption that the execution was returned by direction of plaintiff's attorneys.
5. Where an execution against a corporation has been returned unsatisfied, a sequestration action against the corporation may be commenced at once, even though the sixty days within which an execution is returnable under sec. 2970, Stats. 1898, have not expired, there being no statute requiring the officer to keep the writ the full sixty days.
6. In proceedings by a judgment creditor of a corporation to wind up its affairs, etc., the petition stated the facts relating to the rendition of the judgment and the issue and return of execution unsat-

isfied; that the judgment was unpaid; that the corporation was indebted to various persons and was insolvent and had equitable interests which could not be reached by execution, but failed to state any facts to show that an emergency existed requiring the appointment of a receiver without notice to the corporation. *Held*, that the plaintiff was not entitled to the relief sought except upon notice, and that the order appointing a receiver without such notice was improvidently made and should have been set aside.

7. In such case, on appeal, it is not enough that the facts stated showed the plaintiff would have been entitled to such appointment on notice, and that, after a review of the situation, the trial court decided to allow the appointment to stand.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed in part; reversed in part.*

On May 19, 1900, the plaintiff obtained and docketed a judgment in the superior court of Milwaukee county against the defendants Fred. W. Schneck and the *Blue Mound Investment Company* for $6,102.55. On May 21, 1900, an execution against them was duly issued and placed in the hands of the sheriff of Milwaukee county, which was the domicile of the defendants. This execution was sealed with the seal of the circuit court instead of the superior court. On the same day the sheriff collected thereon the sum of $1,319.48, and returned it unsatisfied as to the sum of $4,787.14. In his return the sheriff certified that, after diligent search and inquiry, he was not able to find any other property, real or personal, within his county, belonging to the defendant *Blue Mound Investment Company*. On the same day the plaintiff made his verified petition to the superior court, setting out the facts relating to the rendition of judgment and the issue and return of the execution, and the fact that the judgment was yet unpaid in part. It then stated that the defendant *Blue Mound Investment Company* was indebted to various persons and was insolvent; that it had equitable interests and choses in action of the value of more than

$3,000, which could not be reached on execution, held by other persons in trust, the exact nature and character of which the plaintiff was unable to discover; that other creditors might begin action, and thus obtain a preference. In his own behalf, and in behalf of all creditors who might come in and exhibit their claims, the plaintiff asked that the said defendant be declared insolvent; that its property be sequestered; that a receiver be appointed, and all creditors be restrained from proceeding against the corporation. On May 21, 1900, this petition was presented to the superior court, and without notice to the defendant an order was entered declaring the corporation to be insolvent, and appointing one Hugo Kraenzlein receiver of all its property; and upon the filing of a proper bond he was authorized and directed to take possession of all of its property, books, papers, and assets. Other creditors were enjoined from proceeding against the corporation, and directed to file their claims within six months. On June 1, 1900, the corporation obtained an order to show cause why the order appointing the receiver should not be vacated, based upon the records in the case and the affidavit of its president. This affidavit alleged collusion between the plaintiff and the defendant Schneck in securing the order, and other facts not essential to this litigation, and claimed that the receiver was not a fit person and would not act impartially in the matter. Counter affidavits were filed, and on June 20th an order denying relief to the defendant was made. At the time of the hearing the plaintiff moved the court for leave to correct the error in the execution by directing the clerk to affix thereto the seal of the superior court in place of the circuit court. The order mentioned permitted this to be done with like effect as if originally affixed thereto. The defendant corporation appeals from said order.

For the appellant there was a brief by *E. L. Wood* and *O. W. Bow*, and oral argument by *Mr. Wood.*

For the respondent the cause was submitted on the brief of *Emil Lenicheck*, attorney, and *W. H. Austin*, of counsel.

BARDEEN, J. The points made by the appellant for the reversal of the order appealed from are as follows: (1) The court ought not to have permitted the plaintiff to amend the execution by affixing the proper seal; (2) no return of said execution has been made, showing that plaintiff had exhausted his remedies at law, and the receivership proceedings were premature; (3) the appointment of the receiver was without notice to the defendant, and no ground is stated in the petition justifying an *ex parte* appointment.

1. The first point made by defendant is fully covered by *Corwith v. State Bank*, 18 Wis. 560. There the clerk neglected to affix the seal of the court to the writs of *fieri facias*. The seals were affixed by order of the court after sale was made, and this was held proper, and fully warranted by the statute then in existence, corresponding to sec. 2830, Stats. 1898. The notes to that section show many cases where the power of the court has been exercised to promote the ends of justice, and unless the rights of third parties have intervened, or the circumstances show some peculiar hardship, the courts seldom deny relief in cases coming within its provisions. The fact that in this case the order allowing the correction to be made was not made until after defendant's motion was served is of no consequence, since the objections to the order attacked covered other grounds than the defect in the execution. Moreover, the ground of the irregularity was not mentioned in the moving papers, as in *Bonesteel v. Orvis*, 23 Wis. 506. In that case the correction of the execution was made by the party, and not by order of the court. We see no ground for criticising the action of the court in permitting the execution to be corrected. There might be cases where, if the amendment were allowed after a motion to set aside had been made, the court should only permit it

upon terms. In this case the plaintiff's motion to amend was granted, and the defendants' motion to vacate was denied, and no costs were given either party, so the question of terms is not here.

2. Under this head the defendant argues that plaintiff's judgment is against both the corporation and Schneck. The return on the execution does not show that the latter has no property, and hence it cannot be said that his remedy on the judgment has been fully exhausted. The proposition that the creditor must exhaust his legal remedies before he can institute proceedings to sequester the property of a corporation and secure the appointment of a receiver is admitted. *Hinckley v. Pfister*, 83 Wis. 64. But, as between the judgment debtors and the plaintiff, each is bound to pay the whole debt; and it is no ground for complaint that the creditor may see fit to collect the debt out of the property of one, and not out of that of the other. *Hyde v. Rogers*, 59 Wis. 154. As against the corporation, the plaintiff has met and complied with all the demands of the statute. It (sec. 3216) provides that when a judgment has been obtained against a corporation, and an execution issued thereon has been returned unsatisfied, then the judgment creditor may proceed to sequestrate the stock, property, and effects of such corporation, and the court may appoint a receiver of the same. The petition in this case shows those facts, and it is no answer for the corporation to say the plaintiff may possibly collect his judgment from the property of some other person liable thereon. He is strictly within his legal rights when he seeks collection from the defendant by sequestration of its effects, when the calls of the statute have been met.

The execution was issued on May 21, 1900, returned the same day, and the petition in this proceeding was filed. Appellant's counsel argue that the court should assume that the execution was returned by direction of the plaintiff's attor-

neys, and thus bring the case within the condemnation of the cases holding this to be fatal to the proceeding. *In re Remington*, 7 Wis. 643; *Spencer v. Cuyler*, 9 Abb. Pr. 382. Without some proof on the subject, we cannot assume that any direction was given to return the execution. The circumstances may justify a suspicion of the fact, but deliberate proceedings in court cannot be overturned upon mere suspicion. Our statute (sec. 2970) provides that every execution shall be made returnable within sixty days after its receipt by the officer. It is universal practice for the officer to exercise his pleasure in making the return. He may keep it the entire sixty days, or he may be possessed of such knowledge of the defendant's circumstances as will warrant him in returning it forthwith as unsatisfied. No statute of which we are aware requires the officer to keep the execution the full sixty days. If he feels confident that the defendant has no property subject to execution, he may return it unsatisfied before the return day. This is the rule in New York under a similar statute, and is in harmony with the practice well known to the profession in this state. See 3 Freeman, Executions, § 353, and cases cited on page 2019; *Whitehead v. Hellen*, 74 N. C. 679; *Findley v. Smith*, 42 W. Va. 299; *Tomlinson & W. Mfg. Co. v. Shatto*, 34 Fed. Rep. 380; *Guerney v. Moore*, 131 Mo. 650. This rule is probably, as said by Mr. Freeman, in opposition to the majority of authorities elsewhere; but our statutes come from New York, and, as is well known, the authorities in that state are most frequently consulted when no adjudications regarding our statutes are found in this state. In *Ford v. Plankinton Bank*, 87 Wis. 363, the execution was returned unsatisfied shortly after its issue, and the suit to sequester the property of the corporation involved was begun long before the return day of the execution. The question here involved did not arise in that case, and it is only cited to show the understanding among the profession that it is not necessary to wait until after the return day of the execution before commencing further pro-

ceedings. Such understanding, of course, is not binding upon this court, and is significant only as showing that the bar has followed the New York rule. See, also, *Clark v. Bergenthal*, 52 Wis. 103; *Pierstoff v. Jorges*, 86 Wis. 128. If the execution may be returned before the return day,— and we think it can, if made in good faith,— then, under sec. 3216, the action of sequestration may be commenced at once. To compel the creditor to wait might defeat the very purpose of the proceeding. While this conclusion may be opposed to the authorities cited in High, Rec. § 404, there are many respectable authorities to support it, as are there noted.

3. The third ground of complaint is that the receiver was appointed without notice to the corporation, and no grounds are stated in the petition to justify such procedure without notice. The statute does not require notice. It permits procedure by petition or action. Whichever plan is adopted, the proceeding is in equity, and is governed by the rules and principles applicable to that branch of jurisprudence. High, Receivers, § 111, states the rule regarding notice as follows:

"Courts of equity are exceedingly averse to the exercise of their extraordinary jurisdiction by the appointment of receivers upon *ex parte* applications, and this practice is never tolerated except in cases of the gravest emergency, demanding the interference of the court to prevent irreparable injury. . . . Even in exceptional cases of great emergency, when the relief is demanded for the prevention of irremediable injury, the courts are extremely averse to interference *ex parte*, and will ordinarily entertain the application only after notice to defendant, or after a rule to show cause."

At § 112 he further states that the rule of requiring notice would seem to be not a matter of discretion, but an inflexible one, which the courts are not at liberty to disregard. At § 113 he says:

"To warrant a court in entertaining an application for a receiver without notice, it must be clearly shown that the delay which would result from giving notice would defeat

the rights of plaintiff, or would result in great injury to him. And when the relief is sought upon an *ex parte* application, upon the ground of extreme necessity, the particular facts and circumstances rendering summary proceeding necessary should be set forth in the application, and a mere statement of opinion as to such necessity, even though made under oath, will not justify a departure from the established rule requiring notice of the appointment." See § 115.

This rule is so well supported by authorities, and is so much in harmony with correct principles, that an extended discussion is not necessary. The proceeding is drastic. It takes away from the corporation all control of its property, and puts it in the hands of a stranger. Its right to do business ceases, and thereafter its affairs are to be administered and closed up under the direction of the court. Cases can well be imagined where great interests might be sacrificed by a proceeding without notice. Unless the emergency is so great and the loss to the applicant so imminent as to warrant procedure without notice, within the rule before stated, the court ought always to require notice to be given. No emergency existed in this case, and no reason is stated why notice should not have been given. It is not enough to say that the facts stated show that plaintiff would be entitled to such appointment upon notice, and that after a review of the situation the trial court has decided to allow the appointment to stand. Upon the petition presented, the plaintiff was not entitled to the relief sought except upon notice. That he failed to give, and the order appointing a receiver was improvidently made and should have been set aside.

By the Court.— So much of the order appealed from as grants leave to correct the error in attaching the seal of the circuit court for Milwaukee county to the execution is affirmed. That part of the order which denies defendant's application to vacate the order of the superior court of Milwaukee county dated May 28, 1900, is reversed, and the cause is remanded with directions to vacate such order and for further proceedings according to law.

BURROUGHS, Respondent, vs. CITY OF MILWAUKEE, Appellant.

April 30—May 21, 1901.

Municipal corporations: Injuries to travelers: Negligence: Defective streets.

In an action for injuries received by stepping into a depression in the street on alighting from a street car at a crossing, it was established by the undisputed evidence that the depression was not more than an inch and a half deep at any point. *Held*, not an actionable defect in the street, notwithstanding it was at a point where a multitude of people were constantly getting on and off the cars.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

For the appellant there was a brief signed by *Carl Runge*, attorney, and *Joseph B. Doe*, assistant city attorney, and oral argument by *Mr. Doe.*

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *W. C. Quarles.*

CASSODAY, C. J. This is an action to recover damages for personal injuries sustained by the plaintiff upon stepping from a street car on which she was riding westerly on Grand avenue after the car had stopped immediately west of the intersection of the west line of West Water street and Grand avenue, by reason of an alleged defect in the asphalt pavement. Issue being joined and trial had, the jury returned a special verdict to the effect: (1) That the plaintiff was injured July 13, 1898, by falling near the northwest corner of the intersection of Grand avenue and West Water street, in the city of *Milwaukee;* (2) that there was at the time when and the place where the plaintiff was injured such a defect in the asphalt pavement as rendered it unsafe or dangerous for persons alighting from street cars when in

the exercise of ordinary care; (3) that the condition of the pavement was, at the time and place of the accident, such that the defendant city, acting through its officers and agents having charge of its streets, in the exercise of ordinary care and prudence, ought to have known that such an accident as happened to the plaintiff might probably occur to persons using such street when in the exercise of ordinary care; (4) that such defective and unsafe condition of the pavement at the time and place of the plaintiff's injury was the proximate cause thereof; (5) that the plaintiff was not, at the time and place of the injury, guilty of a want of ordinary care which contributed to her injury; (6) that the plaintiff's left leg and ankle had not been previously weakened or injured so that it directly contributed to her injury on the occasion in question; (7) that they assessed the plaintiff's damages at $3,000.

Thereupon, and in pursuance of an order of the court, judgment was entered in favor of the plaintiff for the amount mentioned, with costs. From that judgment the defendant brings this appeal.

It is conceded that when the car stopped at the time and place mentioned the plaintiff, who was forty-three years of age and a widow, left her seat, which was crosswise the open car and about the middle thereof, and took hold of the post in front of her on the north side of the car with her left hand, and stepped down upon the step eight inches wide, which extended the whole length of the car, and then, after looking both ways to see if any teams were coming, she stepped down into a depression in the pavement, and her foot bent under her, and she fell, and seriously and permanently injured her. There were two street-railway tracks on Grand avenue, and the car in question was on the north track. It stopped at the usual and customary place for the stopping of all cars proceeding in a westerly direction. The intersection of those two streets was one of the princi-

pal business centers of the city, and was in constant use by large numbers of people traveling on foot and in vehicles. The principal question presented is whether it was error to refuse a nonsuit or to direct a verdict in favor of the defendant; in other words, Was the alleged defect in the pavement such as to authorize a recovery in this action? The answer to the question necessarily depends upon the evidence. Seven witnesses were sworn and examined on behalf of the plaintiff in respect to the dimensions of the hole or depression complained of. The first one testified to the effect that at the time of the accident the hole was from a foot and a half to two feet north of the north rail; that the granite blocks had sunk from a half to an inch below the adjacent pavement; that the hole was scooped out to the south part of the granite blocks towards the rail, between the granite blocks and the north rail of the track, from four to six inches in width, and a foot and a half in length, and an inch to an inch and a half deep; that next to the granite blocks it was straight down, and from the asphalt it was sloping in, and the greater depression was on the north side of the hole. Five of the plaintiff's other witnesses gave similar descriptions, varying in the length given from ten to thirty inches, and the width from six to ten inches, and the depth from one inch to two and one-half inches; all of them giving as the greatest depth one and one-half inches, except two, and they give as the greatest depth two and one-half inches. None of these witnesses made any measurement, but merely estimated the length, breadth, and depth as they remembered them. The testimony of the other witnesses on the part of the plaintiff will be considered later.

It appears from the testimony of a witness on the part of the defendant, and is undisputed, that he repaired the water pipe in front of Bloedel's jewelry store on Grand avenue May 28, 1898; that he cut out the asphalt in a square; that

he filled up the hole, tamped it solid, and put in about seven or eight granite blocks — some being eight inches long, some being a foot, and some a little longer — so as to break joints; that they were six, seven, or eight inches thick, and made to fit in unequal surfaces; that he cut a space about eighteen or twenty inches one way and about the same the other way; that he filled it up as good as he could with gravel and cinders, and tamped it down until it was solid, and pounded down the granite blocks to get them even with the asphalt. A policeman of the city, stationed near where the accident occurred, saw the plaintiff just after the accident, and testified to the effect that he measured the hole or depression on the same day; that he took a straight edge, and laid it across the hole, and by measuring with the straight edge lying northeast and southwest it measured an inch and a quarter at the deepest part, but that with the straight edge lying east and west it measured an inch and a half at the deepest place; that the hole was sort of oval shape; that the asphalt pavement is not exactly level at that place; that, holding the straight edge across one way, the end of it might be a little higher or a little lower than holding it another way, and, so to get the deepest depth, he measured it in different ways; that the depression was eighteen inches east and west (lengthwise), and thirteen inches across (north and south); that the south edge of the depression was two feet and five inches from the north rail of the street-car track. Another of the defendant's witnesses testified that he measured it with a rule he carried in his pocket; that it was eighteen inches long from east to west; that the width from the cobble stones to the asphalt, undisturbed, was thirteen inches; that the deepest part near the granite blocks was an inch and a half; that there was no perpendicular fall at the south edge; that it was "topped" off by the teams about half an inch; that the bottom of the depression sloped from the south to the north, so that the deepest point was an

inch and a half from the level pavement; that the slope began half an inch below the level of the pavement; that he got the measure down, and drew a line; and that he thinks he made such measurement July 28, 1898. Another of the defendant's witnesses testified to the effect that the accident happened nearly in front of his store; that there was a depression in the asphalt pavement at that place at the time; that he should judge it was about eighteen inches long and twelve inches wide, and from an inch to an inch and a half deep, but that he did not pretend to swear exactly to that depth.

Thus it appears that seven witnesses substantially agree as to the depth of the depression, two of them fixing it by actual measurement, and five of them by estimate; four of them being witnesses of the plaintiff. Two other witnesses of the plaintiff substantially agree with such measurement, except that in their estimates they put it about an inch deeper than such measurement. But the witness Meyers, in behalf of the plaintiff, who testified to the effect that he did business at the time of the accident on Grand avenue, three stores west of West Water street; that he heard of the accident three or four days after it occurred; that he did not examine the place of the accident any more than stopping there, waiting for a street car on his way home; that he noticed it, ever since the street was torn up, several times a day; that he noticed that rut up to the time it was filled in and repaired, the spring before the accident, in the same place, as a part of a prior excavation; that the rut was about four or five feet long, and about three feet wide, and probably three or four inches sloped down, worn off from vehicles passing over it, a little more in one place than in another; the deepest part was probably five or six inches; that he made no measurements of that depression; that on the day of the accident the rut was six or seven feet north of the north railroad track. The rut thus mentioned is obviously not the one the plaintiff stepped into, for she testi-

fied that with the left hand upon the post of the car she stepped down upon the step of the car, and from there she stepped down upon the pavement, her foot coming into a hole, and she fell. As indicated above, the plaintiff's first witness on the subject testified that the hole into which she stepped "was from a foot and a half to two feet north of the north rail;" and that corresponds with the measurement made. The charitable view of the testimony of the witness Meyers is that in testifying as he did, nearly two years after the accident, he had reference to the rut as he remembered it at the time the repairs were made in the spring before the accident. Certainly, no substantial reliance can be placed upon his estimate as to the depth of the depression, as against the actual measurement of two witnesses, corroborated by the estimates of seven others. We must hold that it is established by undisputed evidence that the depression was not more than an inch and a half deep at any place. That being so, must we not hold, as a matter of law, that there was no actionable defect in the street? The only serious doubt we have had upon that question is as to whether the city should not be held to a stricter responsibility by reason of the multitude of people constantly getting on and off the cars at that point. But, after careful consideration, we are constrained to hold that there is no credible evidence of any actionable defect in the street at the time and place in question. The facts bring the case squarely within the ruling of this court in a recent case. *Kleiner v. Madison*, 104 Wis. 339. In that case the ends of the boards constituting the apron were sawed off square, and elevated just a trifle less than two inches, and it was held not to constitute an actionable defect in the sidewalk. We are not aware of any well-considered case in this court requiring the case at bar to be submitted to a jury.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

STEGE, Respondent, vs. CITY OF MILWAUKEE, Appellant.

April 30 — May 21, 1901.

Municipal corporations: Defective sidewalks: Uncovered coal holes: Negligence: Personal injuries: Contributory negligence: Court and jury.

1. While covered coal holes and hatchways may lawfully exist in a sidewalk, yet, if they are negligently left open for such length of time that the municipal authorities ought, in the exercise of reasonable diligence, to know and remedy the mischief, the city may become liable for injuries occasioned thereby to travelers exercising ordinary care.
2. Where the lumber with which plaintiff was about to repair the steps of a house was piled in the gutter, and, before working an hour and while walking backwards in order to swing a long piece of timber around the trees, he was injured by falling into a coal hole in the sidewalk, *held*, that plaintiff was a traveler upon the sidewalk, in that he was using it for a lawful and necessary purpose.
3. In such case, it appeared that the cover of the coal hole was in no way defective or liable to slip when properly in position, but that on all pleasant days during the preceding months, and upon the day of the accident, it had been propped open a few inches, and left in that condition until the plaintiff stepped upon it and was injured. *Held*, that such condition constituted a defect in the sidewalk.
4. Whether plaintiff was guilty of contributory negligence in walking backwards, and in not seeing that the cover was propped up, is *held* to have been a question for the jury.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action to recover for personal injuries suffered by the plaintiff on an alleged defective sidewalk. The evidence showed that on the 19th of September, 1895, the plaintiff, who was a carpenter, was engaged in repairing the front steps of a certain house on the east side of Seventh street, in the city of *Milwaukee;* that Seventh street runs north and south, and has upon its east side a sidewalk ten

or twelve feet in width, with a space three feet or more in width between the outer edge of the sidewalk and the curbstone, in which space there stands a row of trees and a hitching post; that the lumber with which the plaintiff was to work was deposited in the gutter in front of the house to be repaired; that in the sidewalk in front of said house, and about a foot or more from the outer edge thereof, there was a hexagonal coal hole, with a removable iron cover, for the purpose of giving access to the excavation underneath the sidewalk; that the plaintiff had been at work half an hour or more upon the steps, and went across the sidewalk to the gutter to get some lumber; that he took up a piece of 2x4 scantling, sixteen feet long, by one end, and, swinging the other end around, he stepped backward a few steps, dragging the piece after him, and while so engaged stepped on the cover of the coal hole, which tipped up, causing him to fall down in the hole astride of the cover, and seriously injuring him. The plaintiff testified that he had no notice that the cover was misplaced. The testimony of other witnesses showed without dispute that during all pleasant days during the preceding summer the cover in question had been propped up by a small stick on one side for the purpose of ventilating the excavation underneath, and that it had been open in this way upon the morning previous to the accident. There was no testimony tending to show that the cover, or the ring in which it was fitted, was in any way defective.

A special verdict was returned by the jury as follows:

"(1) Was the plaintiff injured on September 19, 1895, by falling into a cellar hole in the sidewalk in front of the building known as No. 124 Seventh street, in the city of *Milwaukee?* *Answer by Court.* Yes. (2) Had the occupant of said building, on September 19, 1895, and prior to the accident, opened said hole by lifting the cover on one side, and propping it up? *Answer by Court.* Yes. (3) Did such propping up of such cover on said day cause or constitute such a defect in said sidewalk as to make the use of said

sidewalk dangerous for travelers on foot when exercising ordinary care in passing over the sidewalk? *A.* Yes. (4) Was the cover, as it was propped up, liable to fall in such a position that it would cause or constitute such a defect in said sidewalk as to make the use of said sidewalk dangerous for travelers on foot using ordinary care? *A.* Yes. (5) If you answer the fourth question 'Yes,' would a person of ordinary care and prudence have reasonably expected that the cover, when so propped up, was liable to fall in such a manner that it would constitute such a defect in said sidewalk? *A.* Yes. (6) Was the cover in the same position at the time of the accident that it was placed in by the occupant of the building on the day of the accident? *A.* Yes. (7) If you answer the sixth question 'No,' had the cover fallen after it had been propped up by the occupant, and before the accident? *A.* No. (8) Did the position of the cover at the time of the accident constitute such a defect in said sidewalk as to make the use of said sidewalk dangerous for travelers on foot using ordinary care? *A.* Yes. (9) If you answer the eighth question 'Yes," was such defect the proximate cause of the injury? *A.* Yes. (10) Had the occupant of the building, for several months prior to the accident, almost daily, when the weather was pleasant, opened said hole in the same manner as he did on the day of the accident? *Answer by Court.* Yes. (11) Ought the defendant city, in the exercise of ordinary care, to have known of the repeated propping up of the cover in such position long enough prior to the accident to have avoided the injury? *A.* Yes. (12) Was the plaintiff guilty of a want of ordinary care which proximately contributed to the injury? *A.* No. (13) If the court should find the plaintiff entitled to judgment, at what sum do you assess his damages? *A.* Eleven hundred dollars.

Upon this verdict judgment was entered for the plaintiff, and the defendant appeals.

For the appellant there was a brief signed *Carl Runge*, attorney, and *Joseph B. Doe*, assistant city attorney, and oral argument by *Mr. Doe.*

For the respondent there was a brief by *Somers & Somers*, and oral argument by *P. J. Somers.*

WINSLOW, J. The evidence in this case certainly tends to show that the cover of the coal hole in question had been partially opened and left open nearly every day for several months prior to the plaintiff's injury, and that when so opened it was a serious defect in the sidewalk. Covered coal holes and hatchways may lawfully exist in a sidewalk, but, if they are negligently left open for such length of time that the city authorities ought, in the exercise of reasonable diligence, to know and remedy the mischief, the city may become liable for injuries occasioned thereby to travelers exercising ordinary care. *Whitty v. Oshkosh*, 106 Wis. 87. That the plaintiff was, in the legal sense, a traveler upon the sidewalk is not open to reasonable doubt. Though not walking longitudinally along the sidewalk, he was rightfully using it for a lawful and necessary purpose, and was plainly entitled to the protection of the law concerning defective highways. There was absolutely no evidence to show that the cover was in any way defective, or liable to slip, when properly in position, but there was ample evidence that upon the day of the accident it had been propped open a few inches, and left in that condition until the plaintiff stepped upon it.

It is said that the plaintiff was guilty of contributory negligence, as matter of law, in walking backward, and in not seeing the condition of the cover. Neither of these contentions can be sustained. It is doubtless true that if a man, without cause therefor, were to walk along the street backward, or with his eyes shut, for any considerable distance, and should fall into a hole, he would be chargeable with contributory negligence; but that is not this case. The plaintiff here was simply using a very ordinary and usual method of swinging the end of the long scantling which he was carrying around the trees so that he might take it to the steps which he was repairing, and in so doing he stepped backward a few steps. It was clearly for the jury to say

whether his action was consistent with ordinary care under the circumstances. Nor can it be said that he was negligent, as matter of law, because he had not seen the condition of the cover. He had been at work less than an hour, and his work had been upon the steps of the building upon the other side of the sidewalk. He was evidently busily engaged, and giving his entire attention to his job. Under such circumstances it cannot be said as matter of law that he was negligent in not seeing that the cover was propped up. This was also a question for the jury. *Cantwell v. Appleton*, 71 Wis. 463. The verdict was based upon sufficient evidence, and it plainly sustains the judgment. There are no other questions which require discussion.

By the Court.— Judgment affirmed.

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GROTH, by guardian *ad litem*, Respondent, vs. THOMANN and another, Appellants.

April 30 — May 21, 1901.

Master and servant: Negligence: Personal injuries: Dangerous machinery: Failure to instruct or warn: Presumptions: Evidence: Material error: Special verdict: Court and jury.

1. Where an intelligent girl over fifteen years of age was injured by having her hand caught between the roller and steam jacket of a mangle, she must be presumed to know that, if she gets her fingers caught between a roll turning inwardly from her and a surface against which it runs in contact, she will be injured. Testimony to the contrary does not raise a question for the jury, and it is material error not to recognize and act upon such presumption.
2. In such case where the servant testified she knew how to do her work, and that she was doing it in precisely the right way prior to the injury, with full knowledge that if she allowed her fingers to be caught in the mangle a serious injury to her would probably result, it is error to submit, as part of a special verdict, questions

in respect to failure on the part of the master to instruct her as to the proper manner of doing her work.

3. The duty to instruct, as between master and servant, does not exist as to dangers which are so obvious that the servant must be *held*, as a matter of law, to be as familiar with them as the master.

4. Where a mangle had no discoverable defect, and was shown to have run evenly ever before and ever after the time the servant was injured, and the mechanical connections between the mangle and the motor were such that any unsteady motion was practically impossible, testimony by the servant that the injury was caused by the unsteady motion thereof is so contrary to all reasonable probabilities as not to raise a conflict of reasonable inferences for solution by the jury.

5. It is for the court to determine the effect and weight of the testimony and evidence, and where the physical situations or matters of common knowledge, based on reason and common sense, point so certainly to the truth as to leave no room for a contrary determination, the mere fact that sworn testimony is produced in court to establish a contrary conclusion, even though not disputed by other sworn testimony, does not warrant the submission of the question to the jury.

6. In actions to recover compensation for injuries on the ground of negligence, it is absolutely essential to such recovery to establish not only the breach of duty on the part of the defendant as regards the personal safety of the plaintiff, but that such breach was the proximate cause of the injury complained of, and in such actions a special verdict which contains no finding on the subject of proximate cause is fatally defective.

7. Where in an action for injury to a servant by reason of a defect in a machine the undisputed evidence relieved the master, in the absence of actual knowledge of the defect, from any charge of negligence in not knowing thereof, and the jury found, as part of a special verdict, that the master did not have such knowledge, such finding exonerated the master from all fault, and judgment should have been rendered in his favor.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T WILLIAMS, Judge. *Reversed.*

Action to recover compensation for personal injuries received by plaintiff, a girl about fifteen years of age, caused by her hand being crushed and burned in an ironing device called a mangle, used in a steam laundry. The negligence

complained of was failure to instruct plaintiff how to feed the cloth into the mangle, and want of repair of the machine, causing it to run with an unsteady motion, the roller sometimes nearly stopping and then suddenly starting to run fast, so that, as it so started, the hands of the operator being on the clothes pushing them into the rolls, it had a tendency to draw her hands into the region of danger before she could act to prevent it. The answer put in issue the allegations of negligence and raised the question of whether plaintiff was guilty of contributory negligence.

The evidence was to the following effect: The mangle was a machine about four feet high, measuring from the floor to the top thereof. There was a roller, about eleven feet long and eighteen inches in diameter, which revolved at a speed of from six to twenty revolutions per minute. There was a steam jacket, adjusted so as to be nearly in contact with the roller when it was in operation. The cloth was fed in between the roller and the jacket, the edge of the article to be ironed being first placed in position on the upper side of the jacket and then pressed upward and into the roller by the operator placing the palms of her hands flat upon it as it so lay upon the jacket, with the ends of her fingers raised to avoid danger of having them caught by the roller. There was a governor on the engine and the connections between the motor and the ironing machine were such as to render any considerable unsteady motion of the mangle roll practically impossible. Plaintiff had worked out for wages some two years before she was injured. She had worked around and attended the ironing machine in question about ten days before such injury. The proper way to feed the clothes into the mangle was the way plaintiff said she was doing the work. She testified that she was not instructed how to do her work, but knew from the start that she must be careful not to allow her fingers to be caught by the mangle; that she had seen

others feed the clothes in and did her work the same as they did; that her hand was caught solely by reason of the unsteady motion of the mangle roll; that it had never run that way before about one hour prior to the injury; that she had both her hands in the same position, pushing cloth into the roller, and was looking right at them at the time her left hand was caught; that the only way she could account for the accident was the sudden starting of the roller to go fast. No unsteady motion of the mangle roller had been observed by any of the other employees, of whom there were several who were in a situation to have observed the difficulty if it existed before the accident; nor was any such unsteady motion ever observed afterwards, nor was there any discoverable defect in the mangle or any of its connections to account for any unsteady movement thereof.

There was a motion for a nonsuit at the close of plaintiff's case, and also at the close of the evidence upon both sides. Both motions were denied and due exceptions were taken to the rulings. There was also a motion for the direction of a verdict in favor of defendants, which was denied, and due exception was taken to the ruling. The cause was then submitted to the jury for a special verdict with the following result:

"(1) Was the plaintiff injured on the 23d day of July, 1898, at the place of business of the defendants by having her fingers caught in a steam mangle, between the cylinder and the steam jacket. *A.* (*By the court, by consent of counsel*) Yes.

"(2) What was the age of the plaintiff at the time she was injured? *A.* (*By the court, by consent of counsel*) Fifteen years and six months.

"(3) Did the defendants, or their foreman, know the plaintiff's age prior to her injury? *A.* No.

"(4) Did the plaintiff inform the defendants, or their foreman, prior to her injury, that she had worked in a laundry before and knew how to run such a mangle? *A.* No.

"(5) Was the plaintiff, prior to her injury, sufficiently in-

formed as to the proper manner in which her work at the mangle should be done? *A.* No.

"(6) Was the plaintiff at the time of her injury of such age, experience, knowledge, and capacity that she ought to have comprehended and understood the dangers which were incident to her employment at the mangle in question? *A.* No.

"(7) Was the plaintiff, prior to her injury, warned by the defendants, or their foreman, to keep her fingers out of the place where the towels and and other materials were fed into the mangle? *A.* No.

"(8) Was the plaintiff, at the time the accident happened, using such care and attention in the performance of the work she was engaged in as ordinarily prudent and careful persons of the same age, understanding, and experience would have used? *A.* Yes.

"(9) At the time when the plaintiff was injured was she doing her work in such a careless manner that her carelessness contributed directly to her injury? *A.* No.

"(10) Ought the defendants, in the exercise of ordinary care, to have known from the apparent age, experience, intelligence, and capacity of the plaintiff that she was incapable of comprehending such dangers as were incident to her employment at the machine in question? *A.* Yes.

"(11) Did the steam mangle in question, at or prior to the accident and while the plaintiff was working at the machine, run in a jerky, uneven and unsteady manner? *A.* Yes.

"(12) If you answer the eleventh question yes, did the plaintiff know prior to her injury that the mangle frequently ran in such uneven, jerky and unsteady manner? *A.* Yes.

"(13) If you answer the eleventh question yes, did the defendants or their foreman, prior to the time of the plaintiff's injury, know that the mangle frequently ran in such uneven, jerky, and unsteady manner? *A.* No.

"(14) At the time of the plaintiff's injury, at how many revolutions per minute was the cylinder of the mangle revolving? *A.* No evidence given whereon to base an answer.

"(15) If the court should be of the opinion that the plaintiff is entitled to recover in this action, at what sum do you assess her damages? *A.* Two thousand five hundred and eighty dollars ($2,580)."

Defendants' counsel moved for judgment upon the verdict, also for judgment notwithstanding the verdict, also for an

order setting the verdict aside and for a new trial, all of which motions were denied and due exceptions taken to the rulings. Judgment was rendered in plaintiff's favor upon the verdict for the damages as assessed by the jury. There were exceptions to rulings on requests to submit special questions, made by counsel for defendants, and also to refusals to charge as requested by them.

Joseph B. Doe, for the appellants.

For the respondent the cause was submitted on the brief of *Christian Doerfler*, attorney, and *McElroy & Eschweiler*, of counsel.

MARSHALL, J. The trial of this case seems to have proceeded to the final result appealed from either from forgetfulness or misconception of some plain principles of the law of negligence or of the evidence in the case, or a combination of both. Upon the theory that the allegations in respect to failure on the part of appellants to instruct respondent as to the proper manner of doing her work at the mangle were material in view of the evidence, a number of questions on that subject were submitted to the jury. They were immaterial for three reasons: First, a girl of ordinary intelligence, of the age of respondent when she was injured, must be presumed to know that if she gets her fingers caught between rolls turning inwardly from her, or between a roll turning that way and a surface against which it runs in contact, she will be injured; and testimony to the contrary does not raise a question for a jury. Second, respondent knew how to do her work, and was, according to her own evidence, doing it in precisely the right way prior to her injury and with full knowledge that if she allowed her fingers to be caught in the mangle roll a serious injury to her would probably result. Her testimony is very positive on that. Third, duty to instruct, as between master and servant, does not exist as to dangers which are so obvious that the servant

must be held as a matter of law to be as familiar with them as the master. The principles referred to are elementary, and have been as often applied in this and other courts as the facts have been presented warranting it. *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Schiefelbein v. Badger P. Co.* 101 Wis. 402; *Bigelow v. Danielson*, 102 Wis. 470; *Nugent v. Kauffman M. Co.* 131 Mo. 241; *Jones v. Roberts*, 57 Ill. App. 56; *Connolly v. Eldredge*, 160 Mass. 566; *Coullard v. Tecumseh Mills*, 151 Mass. 85; *Crowley v. Pacific Mills*, 148 Mass. 228; *Pratt v. Prouty*, 153 Mass. 333; *De Souza v. Stafford Mills*, 155 Mass. 476.

Why the claim of negligence because of failure to instruct respondent as to the proper method of doing her work was submitted to the jury is not perceived, consistent with a reasonable knowledge of the situation as the record presents it. It must be presumed that it was known at the time of such submission that the law is well settled that a person of average intelligence, of the age of fifteen years, must be presumed to know that it is dangerous to allow the hand to be caught by revolving rolls, and that evidence from the mouth of a witness to the contrary does not reasonably rebut such presumption so as to take the question, in regard to where the truth lies, to the jury; and further, that it is plain judicial error not to recognize and act upon such presumption. Further, we must assume that so plain a principle of law as that there is no duty to instruct, as between master and servant,, where there is no need for instructions, was not unknown; and above all, since it was clearly shown that respondent was accustomed to feed the mangle in the very way she would have been instructed to do it if instructions were needed and given, that she understood fully the object and the reason thereof and that it was dangerous to allow her fingers to be caught by the rolls, we must presume that the learned trial court, by inattention to the trial or for some other reason, did not understand the evidence when the va-

rious rulings in the case were made, where the subject of her knowledge and need of instruction was involved. The principles that govern this matter are so plain that we do not feel justified in saying more about them at this time, or their application to this case.

We have left, as the only matter covered by the verdict upon which, in any event, a recovery in plaintiff's favor could be justified, the finding that the mangle ran in an unsteady manner. We are unable to find any evidence in the record to support that finding except the evidence of respondent, who testified that the machine commenced to go wrong about one hour before she was injured and that such difficulty was what caused the injury. In view of the undisputed evidence that there was no discoverable defect in the mangle, that it ran evenly ever before and ever after the time in question, and that the connections between the machine and the motor from which the power was received were such that any such unsteady motion as claimed was practically impossible, we must say respondent's evidence was contrary to all reasonable probabilities and did not raise a conflict of reasonable inferences for solution by the jury. Such has been the uniform holding of courts under similar circumstances, and no other would be consistent with reason and common sense. *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277; *Badger v. Janesville C. Mills*, 95 Wis. 599; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382; *Bigelow v. Danielson*, 102 Wis. 470; *Dingley v. Star K. Co.* 134 N. Y. 552.

No one thing would be more helpful in the right administration of justice than a comprehension and application of the foundation principles upon which facts must be established by evidence. The mere fact that sworn testimony is produced in court to establish a fact, even though not disputed by other sworn testimony, does not warrant even the submission of the question involved to the jury. It is the

effect of the testimony or evidence, the weight of it, that must solve the initial question of whether there is a conflict of reasonable inferences calling for solution by a jury. That question is always for the court to determine, and a failure to discharge the judicial function in that regard with firmness and care means a weakening of the system upon which parties must depend for a just and certain determination between right and wrong. Courts must decide whether evidence, in any reasonable view of it, will admit of conflicting reasonable inferences, and in legal actions juries must decide between such inferences. When physical situations or matters of common knowledge point so certainly to the truth as to leave no room for a contrary determination, based on reason and common sense, such physical situation and reasonable probabilities are not affected by sworn testimony which, in mere words, conflicts therewith. The fact established by the situation itself and matters of common knowledge, so clearly that no one can reasonably dispute it notwithstanding evidence to the contrary, must stand uncontroverted and uncontrovertible, condemning as false such contrary evidence, either upon the ground of mistake or something worse. Under that rule there was nothing to submit to the jury in this case, on the question of whether the mangle ran unevenly or not.

There is a further fatal defect in the verdict in that there is no finding on the subject of proximate cause. It seems a work of supererogation at this time to point out and discuss the necessity for such a finding in a case like this, where the fact involved is clearly not established by the undisputed evidence. When a person seeks to recover compensation of another for injuries on the ground of negligence, it is absolutely essential to such recovery to establish, not only a breach of duty on the part of the latter as regards the personal safety of the former, but that such breach was the proximate cause of the injury complained

of. There is no exception to that rule. It is a part of the very A, B, C's of the law of negligence. All courts must recognize and test the right to recover in every negligence case by it. The necessity for the finding, the nature of the subject involved, the proper way of submitting and explaining it to the jury, are so clearly pointed out in the books, and are so involved in the very philosophy, so to speak, of the law of negligence, that a mistake in regard to the matter is hard to justify. *Sheridan v. Bigelow*, 93 Wis. 426. If it were not for such situations as we have here, we should certainly consider it wholly unnecessary to suggest that the mere fact that a person receives a personal injury at the hands of another, directly or indirectly, does not give such person a legal right to compensation for his damages from such other; that there is no legal liability in such a case unless a distinct breach of duty by such other is shown, and, in the light of attending circumstances, he ought to have foreseen that his conduct might naturally and probably result in a personal injury to some one within the scope of his duty to protect, and the particular injury in question was such a result.

There is a still more striking feature in the verdict, in the light of the judgment, than any to which we have referred, in view of the undisputed evidence that, if the injury happened to the girl by any fault that could in any event be charged to appellants as actionable negligence, it was in respect to the unsteady motion of the mangle roll, and further in view of the undisputed evidence that the claimed unsteady motion of the roll existed so short a time before the injury occurred as to relieve defendants from any charge of negligence in not knowing thereof, from mere lapse of time, and of any negligence at all in regard to the matter in the absence of evidence of actual knowledge of the difficulty. Such feature is this: The jury found as a fact that appellants did not know of any difficulty with the move-

ment of the roll before the accident, and yet judgment went in favor of respondent. The finding of the jury, in the light of the evidence we have referred to, exonerated appellants from all fault, and should have led to a judgment in their favor. In saying this, we assume that, if the faulty working of the mangle roll was not the subject prominent in the judicial mind when the case was submitted to the jury, it must have been what ruled the situation in permitting the case to go to judgment as it did. Before the final decision occurred it must have been brought out with too much significance to admit, reasonably, of its being overlooked, that respondent made no claim, by evidence, that any fault of appellants caused her injury except that involved in the unsteady motion of the mangle roll. She said:

"I did not ask any one how to do the work. I thought I knew how to do it. I looked at others doing the work and did not think any instructions were necessary. They pushed the towels in with the palms of their hands with their fingers sticking up, and that is just exactly the way I did it. There is no reason so far as I know why my hand was caught except that the machine went faster than it had been going."

We must conclude that, from press of business or some other cause, the fact that the verdict exonerated appellants from the charge of negligence, as regards the condition of the mangle roll, was not comprehended by the trial court, else the judgment would not have been rendered as it was. Since no actionable negligence was found by the verdict in any view that can be taken of it, for want of any finding on the subject of proximate cause, it seems that the motion for judgment in defendants' favor should have been granted. It follows that the judgment should be reversed, and the cause remanded with directions to render judgment in favor of defendants, dismissing the action with costs.

By the Court.— So ordered.

COXE BROS. & CO., Respondent, vs. MILBRATH, Appellant.

May 1—May 21, 1901.

Suretyship and guaranty: Statute of frauds: Consideration: Memorandum: Appeal: Application of payments: Evidence: Witnesses: Refreshing memory: Impeachment: Res gestæ.

1. A written instrument addressed to plaintiff, which stated that the undersigned agreed to extend an existing guaranty of the credit of a third person for a certain time, to cover sales to be made during such time, is a valid memorandum relating to *future sales*, and sufficiently expresses the consideration within the statute of frauds (sec. 2307, Stats. 1898) requiring a contract to answer for the debt, etc., of another to express the consideration.
2. Where a creditor receives a guaranty only covering credit to be extended to the debtor in the future, and afterwards receives a payment from the debtor without any application thereof by him, the creditor has the right to apply it to the oldest item of the account between them, even though it arose before the guaranty.
3. It is only when the memory needs assistance that resort may be had to memoranda to refresh the memory of a witness, and where a witness does not admit weakness of memory or inability to remember the facts as he understands them, no proper foundation is laid for the use of such memoranda and they should be promptly ruled out.
4. Where a suit is brought against the guarantor of the credit of a debtor, and the guarantor relies on a payment made by the debtor, alleged to have been applied in payment of the account sued on, conversations between the debtor and plaintiff's agent as to the state of the account, and letters written by the debtor to such agent requesting him to misrepresent to the guarantor the state of the account, are irrelevant and not admissible against the guarantor's objection.
5. Had such letters and the conversations related only to matters of impeachment, a general objection would be a waiver of the failure to lay a proper foundation for the evidence.
6. A letter written three days before the transaction in issue is not admissible as a part of the *res gestæ*.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

On August 1, 1895, the defendant executed and delivered to plaintiff a guaranty, of which the following is a copy:

"*Whereas*, Otto Kornreich is indebted to *Coxe Bros. & Co.*, Inc., on open account, for coal heretofore sold and delivered by *Coxe Bros. & Co.*, Inc., to him, in the sum of thirteen hundred and one $\frac{1}{100}$ dollars.

"*And whereas*, Otto Kornreich intends to purchase of *Coxe Bros. & Co.*, Inc., further amounts of coal from time to time after the date hereof.

"Now, in consideration of the premises and one dollar to me in hand paid by *Coxe Bros. & Co.*, Inc., the receipt whereof is hereby acknowledged, I guarantee the payment to said *Coxe Bros. & Co.*, Inc., of the said sum of thirteen hundred and one $\frac{1}{100}$ dollars, now owing to them from said Otto Kornreich; and I further guarantee the payment to *Coxe Bros. & Co.*, Inc., of all further sums which may become due and payable to them from said Otto Kornreich at any time or times hereafter before the 1st day of August, A. D. 1896.

"Milwaukee, August 1st, 1895.

"C. W MILBRATH."

At the time this guaranty expired, Kornreich owed plaintiff $870.78. It continued to sell coal to him, and he made payments from time to time, so that on January 18, 1897, there was a balance due plaintiff of $3,528.64. On that date defendant delivered to plaintiff a writing in the following form:

"Milwaukee, August 1st, 1896.

"*Coxe Bros. & Co., Inc., City:*

"I hereby extend the guaranty of O. Kornreich's account, which expires to-day, to an amount not exceeding twenty-five hundred dollars, until May 1st, 1897.

"Yours very truly,

"C. W. MILBRATH."

Thereafter more coal was furnished and payments made, so that, when the alleged extension expired, Kornreich owed plaintiff $1,583.29. The coal furnished between January 18, 1897, and the date when the extension expired was of the value of $1,859.57. It is to recover the balance due as above stated that this action was commenced, the plaintiff

founding its right of recovery upon said extension agreement. The answer, after sundry denials, sets up payment by defendant to plaintiff of the sum of $2,000, and other payments by Kornreich, so that there was nothing due plaintiff from defendant at the time the action was commenced. On the trial it appeared that the plaintiff had been importuning Kornreich to pay. On March 20, 1897, he delivered to plaintiff his promissory note, indorsed by defendant, to apply on account. The only issue submitted to the jury was whether this note was delivered to, and accepted by, plaintiff's agent, to be applied on defendant's guaranty. The jury found in the negative. Thereupon judgment was rendered in favor of plaintiff for balance due, as above stated, with interest. A new trial was denied, and the defendant has appealed, claiming that the extension agreement is void under the statute of frauds, that the verdict is contrary to the evidence, and that certain evidence produced on the trial was improperly admitted.

For the appellant the cause was submitted on the brief of *Julius E. Roehr.*

For the respondent there was a brief signed by *Van Dyke & Van Dyke & Carter*, and oral argument by *G. D. Van Dyke.*

BARDEEN, J. 1. The plaintiff claims that the two papers offered in evidence should be read together as one instrument, and that by so doing they are not repugnant to the requirements of sec. 2307, Stats. 1898, that a consideration shall be expressed. As we view the situation, a decision of this question is not essential to support the plaintiff's cause of action. The extension agreement was made January 18, 1897. After that date the plaintiff furnished Kornreich coal of the value of $1,859.57. If the new agreement is valid as to coal furnished after its execution, unless it be held that the note given by defendant must be applied upon the guaranty, the judgment must be sustained so far as this

point is concerned. When one approaches a consideration of a question arising under the statute of frauds, he is met with a wilderness of decisions, not always harmonious. Whatever might be our views if the question were a new one, the necessity of following blazed lines, and keeping the way unembarrassed by close distinctions, is manifest. In *Williams v. Ketchum*, 19 Wis. 231, this court held that a memorandum to the effect that the signer would be responsible for the purchase of goods by one party from another, until notice to the contrary, was equivalent to saying to the party that, if he would sell goods to the third party, the signer, in consideration thereof, would be responsible for the amount of such sale until notice to the contrary. It then said that "it has been uniformly held that such memorandums relating to *future sales* do express, not in so many words, but as gathered from the whole instrument, the consideration, and are valid." In *Waldheim v. Miller*, 97 Wis. 300, the guaranty was as follows: "I hereby guarantee account of Edward Bliven to Waldheim & Co. for $221.25, at $40 per month; the payments commencing September 8, 1894." Parol evidence was admitted to show that the account named was not an already existing account, but one about to be contracted, and which was not in fact contracted until after the guaranty was given. The court said: "This made a valid, present consideration, which is sufficiently expressed in the writing to satisfy the statute." The guaranty in suit easily comes within the rule of those cases, and is valid as to sales made after its delivery. Even if we admit that the guaranty limited total sales to $2,500, the situation is not changed. The evidence shows that after its delivery the total sales amounted to only about $1,800. When payments were made, no application of them was made by Kornreich. The plaintiff had a right, as it did, to apply payments on the oldest item of the account. Brandt, Suretyship & G. § 330.

2. The argument that the verdict was contrary to the evidence was properly addressed to the trial court. His decision cannot be overturned, unless we can say it was palpably wrong. The evidence regarding the question whether the note indorsed and paid by defendant was to be applied on the guaranty was sharply in dispute. There is evidence on both sides, and no such preponderance as would warrant us in disturbing the ruling of the trial court.

3. The question regarding the application of the note mentioned upon the guaranty was the all-important question of fact in the case. Plaintiff's Milwaukee office was in charge of its agent, Mr. Kuesel. He was called as a witness for plaintiff, and after stating his attempts to make collection from Mr. Kornreich, and the receipt of the note by him, he was asked: "Did you, while the receipt of that note was fresh in your memory, make any written memorandum of any kind in regard to that transaction?" He replied that he wrote a letter, and that he had refreshed his recollection therefrom. Upon his earlier examination, he had testified that defendant had delivered the note to him. Kornreich testified that he secured the note from defendant, and delivered it to Kuesel, upon the understanding that it was to apply upon the guaranty. It was to rebut this testimony that the question referred to was propounded. Defendant objected to the testimony as not being proper because the letter was not produced. Thereupon the letter was produced and identified, and the record shows the following proceedings:

"*Plaintiff's counsel:* We offer the letter in evidence. (*Objected to.*) *Court:* I will not allow it to go in evidence at this time, but the witness can use it as a memorandum to refresh his memory. (*Exception.*) *Plaintiff's counsel:* We now offer the letter in evidence in connection with the witness's testimony. (*Objected to as incompetent. Objection overruled. Exception.*) *Court:* Of course, the rule is very peculiar in respect to that; very unsettled."

The witness then testified that he had read this letter, and was positive that Mr. Kornreich did not deliver the note to him, and that it was not true that he told him it was to apply on the guaranty. He then spoke of a conversation with defendant at the time he paid the note, and produced another letter, written four days after the note was paid, from which he had refreshed his recollection. The following, with reference to this letter, appears in the record:

"*Plaintiff's counsel:* I suppose that is subject to the same ruling your honor has made. I will now offer it in evidene. (*Objected to.*) *Court:* The rule is that when the witness has an independent present recollection the paper will not be admitted in evidence, while if he has no present recollection, but testifies from his conviction as to the papers, it will be admitted." "*Court:* I will state here, in connection with the other ruling, that although I may refuse to let the paper go in evidence, the rule is well settled that the opposing counsel and the jury have a right to inspect the paper from which the witness has testified, but it does not follow from that that it should go in evidence. But it can be used, and should be given, for the instruction of both counsel and jury."

There is nothing appearing in the case going to show that the witness was at all infirm in his recollection of the facts in controversy. He does not at any time admit weakness of memory or inability to remember the facts as he understands them. A very complete and helpful discussion of the law of evidence in relation to the use of memoranda to refresh the memory of witnesses is contained in Jones, Ev. §§ 877–886. After discussing the mode of using the memoranda, at section 883 he says: "It is hardly necessary to state that it is *only when the memory needs assistance* that resort may be had to these aids, and that, if the witness has an independent recollection of the facts inquired about, there is no necessity or propriety in his inspecting any writing or memorandum." We are unable to determine from the record to what extent these letters were used before the jury.

The defendant's counsel assumes that they were in evidence, while the other side claim they were not. As to the first letter, there was an unqualified offer of it in evidence, an objection, which was overruled, and an exception. Later remarks of the court raise some doubt of whether he considered it was in evidence. The ruling mentioned puts the first letter in evidence. Unless the witness needed it to aid his memory, it had no place in the case. Without the proper foundation being laid, the court should have promptly ruled both letters out.

Testimony was also offered and received of conversations between plaintiff's agent and Mr. Kornreich confirmatory of plaintiff's case, and in contradiction of the testimony given by him. A general objection was overruled, and a motion to strike out denied. Several letters written by Kornreich to Kuesel were also produced and admitted. Some of them tended to contradict the testimony of the writer, while others had a direct bearing upon other features of the case. None of them was admissible as against the defendant. Had they and the conversation mentioned related only to matters in impeachment of the witness, the failure to make the objection in proper form might be considered a waiver of the failure to lay a proper foundation for the evidence. Jones, Ev. § 849. But such is not the fact. Conversations generally about the state of account, the letter regarding the request of Kornreich for Kuesel to misrepresent the state of his account to defendant, had no relevancy to the issue being tried. The letter had a tendency to impeach the general character of the witness. It was not a part of the *res gestæ*, as it was written several days before the note was executed. For the errors in the reception of evidence, the judgment must be reversed, and a new trial had.

By the Court.— So ordered.

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SPEISER, Receiver, Appellant, vs. MERCHANTS' EXCHANGE BANK and another, Respondents.
SAME, Respondent, vs. SAME, Appellants.

May 1 — May 21, 1901.

Receivers: Compensation: Employment of attorneys: Attorney's fees: Settling accounts: Marshaling of assets and expenses: Payment of expenses: Interest.

1. The fact that property is in the custody of the law is no justification for violating the principle that, save as costs are taxable by statute, property should not be taken from its owner directly, or indirectly in the form of allowance to a receiver or other trustee, to pay the expenses of his adversary in litigation.
2. The compensation of receivers, trustees, and other like officers of courts should be restrained to reasonable charges, measured, not by the highest salaries which large establishments may pay, but by analogy to such as the law allows to public officers having similar duties.
3. It is one of the duties resting on receivers, trustees, and like officers of courts, that they exercise the same diligence to keep down expenses that they use in protecting or realizing upon the property intrusted to them.
4. Almost the only step taken by the receiver of an insolvent corporation, which was not worthy of criticism, was his prompt and commendable diligence in disposing of the stock of goods coming to his hands for a fair sum, and it appeared, among other things, that he withdrew the money realized on such sale from a respectable bank within a month after making the sale, and secretly loaned it to his personal friends and to the firm of which he was a member; that he immediately retained, and began making large payments to, attorneys who represented one class of contesting claimants for the proceeds of the assets in his hands, including in such payments their services in commencing the suit for sequestration, and suits for attacking the validity of attachment liens for which he was in no way liable; that he took no vouchers for such payments, and made them without any order of court therefor, and without the advice of disinterested counsel; that he resisted all demands upon him to make any report or account; that when personally cited by order of the court, he neglected to include in his account an item of $90, and all interest; and that upon the hearing

instead of making full disclosures he placed every obstacle in the way of discovery as to his handling of the money, denied loaning any of it to his firm, and imposed upon those interested in the funds in his hands the labor of discovering facts he had concealed. *Held*, such affirmative misconduct as warrants imposing on him as the penalty entire exclusion from any allowance by way of compensation.

5. While it is possible that the attorneys for one of the antagonistic parties to litigation over assets in the hands of a receiver may be safe advisers for the receiver, the probabilities are all against it. Such practice is a dangerous one and should be discouraged.

6. In such case payments to such attorneys should not be approved, or their advice recognized as justification of the receiver's acts, unless it is made entirely clear that the necessarily and properly prejudicial attitude of such counsel cannot have affected their service to the receiver.

7. A receiver represents all persons interested in the proceeds to be realized by him. His duty is as high to one as to another, and he must not join as a partisan with one or one class against another. If he does so, without express order of the court, his action will not be approved, nor will he be allowed, as against general funds, expenses thereby incurred.

8. Where the financial transactions of a receiver for presentation to the court were of the simplest, and consisted of the receipt, within one month after his appointment, of a gross sum of money, and of a few items of interest thereon, and of some twenty-five items of disbursements, they do not justify the expense of employment of professional assistance in stating the account.

9. Where, after certain creditors had attached the property of an insolvent corporation, and other creditors had begun proceedings to sequestrate the corporate property, a receiver was appointed in such proceedings, and the prosecution of the attachment suits enjoined, and the sequestration proceedings did not result in the production of any new fund, the receiver is not entitled, without the express order of the court, to credit for expenses and attorney's fees in prosecuting the sequestration proceedings.

10. Where the court has adjudged possession and sale by a receiver, rather than by the less elastic methods permitted the sheriff, advisability and benefit are presumed, and the necessary expense of the taking, care, and disposition of the property, at least, must come out of the proceeds.

11. When there are different funds in the hands of a receiver, the court should so marshal them as that general expenses will be paid out

of general funds, and nothing out of those affected by special rights or liens except such as pertain directly to the creation or conservation of such special fund.

12. A receiver, in reliance upon the decisions of the supreme court in the action in which he was appointed, is justified in paying the necessary and reasonable expenses attending the general performance of his duties as an administrative receiver out of funds in his hands, and should be given credit therefor in his accounts.

13. Where the property of an insolvent corporation was claimed by general creditors and also under attachment liens, a receiver appointed in sequestration proceedings is not entitled to credit for a voluntary payment of expenditures and attorney's fees incurred in the litigation between the two classes of creditors, in the absence of any showing that he had thereby created a fund for the benefit of a class, all the members of which ought to contribute to the expenses of creating that in which they are to share.

14. The receiver of a corporation is entitled to credit for expenditures and reasonable attorney's fees in defense of his actual possession of the property confided to him by the court; in taking, arranging, and disposing of such property; in efforts to obtain possession of the books and other assets of the corporation; and in instituting suits on assigned accounts at the express order of the court.

15. In such case the attorney's fees, taxed as costs and collected, must be deducted from the value of attorney's services, as fixed and allowed by the court.

16. Where a receiver of an insolvent corporation delayed rendering his accounts for many years, and, without justification, paid large sums to attorneys for their services and disbursements under a misunderstanding of his duty, and thereafter diverted a large part of the proceeds intrusted to his care to his own use, the court, in the exercise of its discretion, charged him only with simple interest upon the whole balance due from the time he should have rendered his account.

APPEALS from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed upon the appeal of the receiver; reversed upon that of the creditors.*

Appeal from order settling accounts and awarding expenses and compensation to the receiver in the case of Ballin and others, as plaintiffs, against the J. & E. B. Friend Lace Importing Company and others, as defendants. On

January 16, 1890, the plaintiffs Ballin & Co., judgment creditors, commenced suit by Williams, Friend & Bright, and Finches, Lynde & Miller, as their attorneys, to close up the defendant corporation, and sequestrate its property, under sec. 3216, R. S. 1878. At that time the *Merchants' Exchange Bank* and the *Kalamazoo Knitting Company* had attached all the stock in trade of the insolvent corporation, and the sheriff was in possession. Certain other creditors had filed subsequent attachments on the same property. In addition, all of the accounts receivable of the insolvent corporation had been assigned to a class of creditors represented by Messrs. Quarles, Spence & Quarles. Upon the filing of the complaint, the court entered an order sequestrating the property and enjoining all parties from prosecuting other suits against the corporation, and appointed *Morris Speiser* receiver, in pursuance of the statute, and ordered him to take into his possession all of the property of said corporation, and dispose of the same, and ordered that the sheriff turn over to him the stock of goods then held under attachment. Thereupon appeals were taken by the two classes of attaching creditors, especially from that part of the order commanding the sheriff to relinquish possession to the receiver and the part enjoining other proceedings. On that appeal the plaintiffs Ballin & Co. were named as respondents, and upon their attorneys the notice of appeal was served, and in this court the brief in opposition to the appeal was signed by their attorneys, describing themselves as attorneys for the respondents. The order was affirmed on appeal. *Ballin v. Loeb*, 78 Wis. 404. Meanwhile, the property having been turned over in accordance with the order of the circuit court, it was at once disposed of by the receiver for $7,225. On January 15, 1894, after extended trial in circuit court, after the filing of the *remittitur* on the former appeal, an order was entered denying the claims of any of the defendants to preference by reason of their attachments, and ad-

judging that all proceeds of property in the hands of the receiver be divided among all creditors who should prove their claims ratably. That order also directed the receiver to bring suits against the respective assignees of accounts receivable, holding that the main action could not be maintained against them for that relief. Thereupon the attaching creditors again appealed, and their appeal was defended in this court by O. T. Williams and Miller, Noyes & Miller, under the designation of attorneys for plaintiffs and respondents. The decision of the trial court was reversed as to the rights of the attaching creditors to preference. Opinion filed February 5, 1895 (*Ballin v. Merchants' Exch. Bank*, 89 Wis. 278). This decision was considered by the receiver's attorneys conclusive against his right of recovery in the suits against the assignees of the various accounts, and those actions were discontinued in April, 1896. Commencing about September, 1896, the attorneys of the *Exchange Bank* persistently demanded that the receiver file his account and distribute the money in his hands, which he failed to do until an order to show cause was served upon him returnable October 11, 1897, whereupon he presented an account, and amended the same the following day. That account showed total receipts of $7,504.10, and claimed credits to the amount of $7,523.95, to which was afterwards added $250 additional attorney's fees claimed (of these credits, $2,500 was claimed as compensation by the receiver, and over $3,500 for attorney's fees); thus more than exhausting the entire estate. The account was objected to, and referred to Commissioner Hugh Ryan for examination and report. He reported receipts of money, including interest, actually collected by the receiver, to the amount of $8,151, consisting wholly of the proceeds of the attached property. He allowed credit to the receiver for $600, confined to services in the disposal of the property turned over to him. He allowed disbursements for counsel fees for general retainer

and general advice in and about the receivership $600, and for services in the suits upon the assigned accounts, $200, and for services in connection with the final accounting $150. He also allowed as credits money disbursements amounting to $1,409.35, all relating to the acquisition, care, and disposal of the stock of merchandise, except an item of publishing notice to creditors, and the costs paid on discontinuance of the suits against the assignees of accounts. The court modified this by allowing in addition $800 of attorney's fees in the course of the litigation in the present action, and an unitemized allowance of $142.43 for various disbursements made by the attorneys; also for disbursements for the costs, printing, and so forth, upon the second appeal, above mentioned. He also added $150 as compensation to the receiver for his services in connection with the various stages of the litigation. The court thus found a balance due from the receiver of $3,808.58, to which he added interest at six per cent. from December 1, 1897, and ordered that the receiver forthwith pay the total to the clerk of the court. From that order both the receiver, *Morris Speiser*, and the attaching creditors, *Merchants' Exchange Bank* and *Kalamazoo Knitting Company*, appeal.

For the receiver there were separate briefs by *Moritz Wittig*, attorney, and *Edwin S. Mack*, of counsel, and oral argument by *Mr. Mack*. They contended, *inter alia*, that the receiver was justified in paying his counsel without an express order for that particular purpose. High, Receivers, §§ 217, 798; Beach, Receivers, §§ 263, 751; *Haydock C. Co. v. Pier*, 78 Wis. 579, 582; *Fuller v. Abbe*, 105 Wis. 235; *Farwell v. W. U. Tel. Co.* 161 Ill. 613; 20 Am. & Eng. Ency. of Law, 191; *Shainwald v. Lewis*, 8 Fed. Rep. 878.

For the *Merchants' Exchange Bank* and *Kalamazoo Knitting Company* there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders*.

DODGE, J. The present case is so impressive an illustration that we cannot ignore the duty to make it the text for some general remarks upon a tendency at the bar, and even with courts, which promises to develop into a most serious abuse, if it has not already done so. That tendency is to look upon funds *in gremio legis* as not sheltered by the same rights of ownership, and not entitled to the same protection from extortionate and unreasonable charges, as if they had remained under the control and custody of their owners. Some of the demands made against such funds could be justified only upon the view that they are already divested from all private ownership — that any part thereof which ultimately reaches those to whom they really belong does so only by grace, or by way of free gift; so that any deductions therefrom, however illogical in character or excessive in amount, cannot be subject for complaint by any one. This court, in some recent decisions, has attempted to check this tendency in certain of its phases. *In re Donges's Estate*, 103 Wis. 497; *Patton v. Ludington*, 103 Wis. 629, 651. While the statutory restrictions there enforced are, perhaps, not universally applicable, one of the principles announced should be constantly in mind, namely, that property should not be taken from its owner to pay the expenses of his adversary in litigation, directly or indirectly. The fact that such property is in the custody of the court is no justification. The tendency of which we speak has not gone unnoticed elsewhere. It has been characterized by MILLER, J., as "the grossest judicial abuse of the modern day." *Trustees v. Greenough*, 105 U. S. 527, 538. It has led the New York court of appeals to admonish a trial court that it "does not sit as a bandit dividing booty." *Att'y Gen. v. North American L. Ins. Co.* 91 N. Y. 57. Valuable suggestions as to some of the limits upon receivership expenses are set forth in *Henry v. Henry*, 103 Ala. 582. As in cases of this character, the creditors or others interested in the

fund, and on whom really falls the burden of improper or excessive allowances, are often numerous, their individual interests small, and their presence in the litigation only by representation, it is all the more a duty of courts to vigilantly protect them against the cupidity of those who are placed in control over the property, and to restrain court officers to reasonable compensation for the services which they render. We have pointed out in *Richardson v. Tyson*, *post*, p. 572, that guardians *ad litem* are public officers, and should be compensated in analogy to official emoluments. The same is true, though perhaps in less degree, of receivers, trustees, and other like officers of courts. They should be restrained to reasonable charges, measured not by the highest salaries which large establishments may pay, but by analogy to compensation which the law allows to public officers having similar duties. For the settling of an estate of the size of this, an administrator would be entitled to about $200. While the analogy is perhaps not very close, yet it is suggestive when the receiver demands $2,500 for his administration. One of the duties resting upon such officers is that of the same diligence to keep down expenses that they owe in protecting or realizing upon the property. Industry and skill in the latter respect will be of little benefit if the fruits thereof may be dissipated by reckless extravagance of expense, whether for counsel fees or otherwise.

We have indulged thus much in generalization upon a very important subject because of the impossibility of prescribing fixed rules of law. Hardly any form of charge or disbursement which a receiver can imagine is without some authority to support it. Indeed, it is hard to say that any may not, under some circumstances, be permissible. Only in the wise discretion and firmness of the courts can there be found prevention or remedy for the abuse and disgrace of judicial conservation of estates from their enemies, only to permit their destruction by the very salvors. If such abuses con-

tinue, the beneficent power of a court of equity to take to its sheltering arms a litigated estate while rights to it are being established will become a mockery, worse than the avoided perils as it is more effective.

The record before us presents one of the most extreme cases of affirmative misconduct on the part of a receiver within the history of the court. Indeed, almost the only step taken by him which is not worthy of criticism is his disposal of the stock of goods coming to his hands. That stock he received about January 30, 1890, inventorying at cost about $14,000, and at the sheriff's appraisal about $8,800. Within one month, to wit, on February 26th, he did, with commendable diligence, make a lump sale of the entire stock, under the order of the court, for $7,225, and received the money therefor. The following month he sold the only remaining asset in his hands — the safe — for $90. A month later he withdrew substantially all this money, except disbursements he had already made, from a respectable bank, in which a record of his cash transactions would have necessarily appeared. The money then drawn — $6,000, on April 12, 1890 — has never again appeared in any bank. It now transpires that he made loans of the money thus in his hands to various acquaintances upon interest, probably only a part of which have yet fully been discovered. He immediately retained, and commenced making large payments to, the attorneys who represented one class of contesting claimants for the proceeds of the assets in his hands, including in such payments their services in commencing the suit for sequestration and attacking the validity of the liens acquired by the appellants, *Merchants' Exchange Bank* and *Kalamazoo Knitting Company*, for which he was in no way liable. He took no vouchers for such payments, and it is now impossible, from the evidence at least, to discover the purpose of several of the attorneys' disbursements for which he paid them. He continued payments to the plaintiffs' at-

torneys without order of court, and without advice from disinterested counsel, indiscriminately, for services helpful to him in the performance of his duties as receiver and those rendered exclusively in the interest of the plaintiffs in their contention with the attaching creditors. He resisted all demands upon him to make any report or account, and, when finally cited by order of court, he presented an account which failed to give any credit for the sale price of the safe or for any interest. This he followed on the following day by an account correcting the omission as to the safe, and charging himself with interest received from Landauer & Co., $18.95, and from Friend Bros. Clothing Company, $170.15, and declaring unambiguously that he had received no other interest. That account claimed credits to more than exhaust the total assets coming to his hands, consisting of $2,500 for his own services and of attorneys' fees aggregating some $3,553.93. He presented to the court no books of account, not even canceled checks or stubs of checks, and for several very doubtful disbursements he had no vouchers. Upon the hearing he placed every obstacle in the way of discovery as to his handling of the money; denied absolutely that he ever loaned any of it to his own firm, Speiser, Bing & Co., or received any interest from them; told an utterly confused story with reference to various efforts to find safe places to put the money, and to the carrying of it about in his pocket, sometimes in currency, sometimes in bank drafts, and sometimes in certificates of deposit. Afterwards, when confronted with the books of several firms to whom he had loaned moneys, including those of Speiser, Bing & Co., he lapsed into that form of falsification, "I can't remember," which has been classic certainly since the trial of Queen Caroline, and that, too, with reference to subjects where other testimony showed forgetfulness impossible consistently with truth of the other assertions, and where forgetfulness was itself a breach of

his duty to furnish information. He was at last driven to confess that in October, 1895, when his own firm failed, the balance of the moneys then in his hands — sometimes spoken of as about $2,500, and sometimes as $2,900 — he took to himself in the guise of compensation, and expended it in making settlement with his creditors. The appellant creditors were thus driven to extraordinary research in all places where he was likely to have loaned this money. They thus brought to light the facts that during a large share of the time between the withdrawal of the money from the bank, April 12, 1890, to December 3, 1894, when it was paid back to him by Friend Bros. Clothing Company, he had kept these moneys invested, first with one Landauer, who had paid him $193.23 as interest; then from August 5, 1892, until November 29, 1893, with his own firm of Speiser, Bing & Co., from whom he took a note drawing seven per cent., on which there had been paid into his private account, not as receiver, $473 of interest; that he then commenced to withdraw from Speiser, Bing & Co., and loan to the Friend Company, who repaid him the money, together with $170.39 of interest, on December 3, 1894. The data thus obtained also make it reasonably certain that a sum approximating $2,000 was only gradually drawn from Speiser, Bing & Co., so that an average period for its retention by them would be about six months. No evidence was adduced as to what he did with the $6,000 for about a year after it was withdrawn from the bank in April, 1890. In all this investigation he persistently obstructed and imposed on the creditors great labors, which proper account books would have rendered unnecessary, and which, if it became necessary, he ought to have performed.

In the light of such a record it is unnecessary to consider the niceties of the rules governing conduct by receivers. Secret loaning of money, resistance of all demands for accounting, suppression of facts with reference to his handling

of the money, grossly improper expenditures, and the imposition upon those interested in the fund of the labor of discovering facts which the receiver had concealed instead of fully disclosing, convict him of such breaches of the most important and highest duties of a receiver that both the referee and the court should, without hesitation, have imposed, as the least penalty, entire exclusion from any allowance by way of compensation. *Clapp v. Clapp*, 49 Hun, 195, 201; *Henderson v. Sherman*, 47 Mich. 267.

An earnest plea was made by the counsel, not exactly for the receiver's innocence, but for his ignorance, contending that he had relied at all times upon the advice of his attorneys. We cannot listen to this plea. He had selected as attorneys men who were interested in one side of the litigation, and who could not advise him impartially. This fact must have been obvious to the simplest mind. Again, it is impossible that he was oblivious of the fact that he was a creature and mere implement of the court, and that to that court he could always go for instruction and advice. While it may in some cases, or on some subjects, be possible that the attorney for one of the antagonistic parties may be a safe adviser for the receiver, the probabilities are all against it. The practice of employing such counsel is a dangerous one, and should be discouraged. Ordinarily, attorneys already retained for the plaintiff are, by reason thereof, committed to a partisan purpose, and to the interest of their client, their duty to whom must usually exclude the impartial point of view which the receiver should maintain. Only when it is made entirely clear that the necessarily and properly prejudicial attitude of such counsel cannot have affected their service to the receiver should any payments to them be approved, or their advice be recognized as any justification of the receiver's acts. High, Receivers, §§ 216, 806; *Adams v. Woods*, 8 Cal. 306, 318; *Heffron v. Flower*, 35 Ill. App. 200; *Farwell v. Great Western Tel. Co.* 161 Ill. 522, 613.

Even if ignorance of his duty might be an excuse to this receiver, we cannot, after reading his testimony, believe in such ignorance. Men who, without intentional turpitude, have erred, when called to account do not indulge in the intricacy and adroitness of concealment and falsification and refusal to remember, which pervade the many pages of this receiver's testimony. It calls for the highest condemnation of courts, and wholly excludes the propriety of allowing him any compensation for his own services.

In addition to the disallowance of compensation for his own services, the conduct of the receiver with reference to his final account is such that it would be an abuse of discretion to allow him any expenses incurred in the statement or settlement thereof. Conceding the propriety, in a proper case, of the estate bearing the expenses of passing the account of a court officer (see *Richardson v. Tyson, post*, p. 572), none of the circumstances are here present to warrant it. The financial transactions calling for presentation to the court were of the simplest. The receipt, within a month after his appointment, of a gross sum of money, the further charge of a few items of interest received upon that money, and against this some twenty-five items of disbursements, did not justify the employment of any professional assistance in stating that account. A schoolboy of fair intelligence could have kept the account and stated it. Much more should that have been possible to an experienced business man of the financial adroitness of this receiver. Every step with reference to the account in which is involved difficulty or labor has been due to his own misconduct, and he must not be permitted to impose upon this estate further depletion by reason thereof, especially when his conduct has imposed on the opposite party such burden of unnecessary labor and expense to discover facts which should have been clearly disclosed by the account itself.

In passing upon the propriety of allowing the various dis-

bursements claimed to have been made by the receiver, a classification must be made, and there must be considered the rules of law applicable to each class. The proceedings and consequent expenses present three different aspects: First, there is the contention of the plaintiffs, as general creditors, against said appellant lienholders, as to the validity of such liens, and as to which should receive the proceeds of the property; second, there were the proceedings of the receiver in obedience to the general commands of the court to take, care for, and transpose into money this particular property for the benefit of whoever might have rights in it; and, third, the proceedings of the receiver in the effort to find and bring other assets under the control of the court for the benefit of the general creditors.

As to the first class of expenses, while there may be some confusion of decision in its application, the controlling general rule is not doubtful. The receiver represents all persons interested in the proceeds to be realized by him. His duty is as high to one as to another, and he must not join as a partisan with one or one class against another. If he does so,—certainly if without express order of the court,—his action will not be approved, nor he be allowed, as against the general funds, expenses thereby incurred. *T. T. Haydock C. Co. v. Pier*, 78 Wis. 579, 582; *In re Donges's Estate*, 103 Wis. 497. True, there are many cases in which a receiver has been allowed for disbursements in contests between different classes of claimants to assets, but in substantially all of them it will be found either that a new fund has been created, or an existing one saved from depletion, or sought to be, which fund belonged to the class in aid of which the receiver acted; so that the allowance was in fact paid out of the fruits of the receiver's acts. *Fuller v. Abbe*, 105 Wis. 235; *T. T. Haydock C. Co. v. Pier*, *supra;* Beach, Receivers, § 753; High, Receivers, § 806; *Att'y Gen. v. North American L. Ins. Co.* 91 N. Y. 57;

Strong v. Taylor, 82 Ala. 213; *Petersburg S. & I. Co. v. Dellatorre*, 70 Fed. Rep. 643; *Burden Central S. R. Co. v. Ferris S. M. Co.* 87 Fed. Rep. 810. In no case, save as costs are taxable by statute, should a fund belonging to one litigant be depleted to pay the expenses of his antagonist, either directly or indirectly in the form of allowance to a receiver or other trustee.

As to the proceedings within the second class there can be no serious doubt. The propriety of the court, in exercise of its equitable powers, taking into its own hands the disposal of this merchandise, is *res judicata* in this case, under the decisions of this court at 78 Wis. 404, and 89 Wis. 278. The validity of such action does not depend on the result. The court having adjudged advisable possession and sale by a receiver, rather than by the less elastic methods permitted to the sheriff, advisability and benefit are presumed. In this case the probabilities are pretty strong that such step was advisable, and that the receiver's management produced a price largely in excess of any obtainable at sheriff's public sale. Whether that be so or not is, however, immaterial. The necessary expenses of the taking, care, and disposition of that merchandise, at least, must come out of its proceeds. Secs. 3217, 3245, Stats. 1898; *T. T. Haydock C. Co. v. Pier*, 78 Wis. 579, 582; *Kneeland v. Am. L. & T. Co.* 136 U. S. 89, 98.

In dealing with the third class of expenses the court should, when there are different funds, so marshal them as that general expenses will be paid out of general funds, and nothing out of those affected by special rights or liens, except such as pertain directly to the creation or conservation of such special fund. Here, however, there is no general fund, and the only one in the hands of the receiver is claimed to be burdened with liens to more than its amount. The merchandise from which it was realized, however, was the property of the insolvent corporation. It passed to the re-

ceiver, to be treated and administered by him as such in all respects, and not subject to any lien. An examination of the two prior decisions by this court permits no other view, and those decisions, whether right or wrong, constitute the law of this case. The lien of the attaching creditors might have been preserved expressly, but it was expressly divested, leaving to the attaching creditors merely the right to come into this action, and share in the funds realized by the receiver according to their equitable rights, as they might ultimately establish them. This court said (78 Wis. 412):

"All the property is sequestered, including that in the officer's hands under attachment or execution. Any less than all the property of the insolvent corporation would be ineffectual to make an equal, just, and fair distribution among all the creditors in proportion to their claims. It is all sequestered, and all of it must go into the hands of the receiver, to be disposed of by him alone as an officer of the court; and all persons having any of the property must be ordered to deliver it to him."

This language bears no other construction than that the receiver had both the right and duty to treat all such property as general assets, and need make no distinction between one class and another pending his administration. He was not to be concerned with what the court might do ultimately with the funds resulting from that administration. We think that it would overrule the fair construction of these previous decisions to hold now that it was at all times the duty of the receiver to keep this particular fund distinct and sacred; that he must omit all his ordinary duties as receiver necessitating expense,— even those enjoined upon him by express order of the court,— unless other means were provided for meeting such expense. We hold, therefore, that in reliance on those decisions the receiver was justified in paying the necessary and reasonable expenses attending the general performance of his duties as an administrative receiver out of the funds in his hands, and should be given credit therefor. Secs. 3217, 3245, Stats. 1898.

The foregoing rules, applied to the disbursements presented for credit by the receiver, must exclude all those relating to the commencement and prosecution of the main action for the sequestration of property, appointment of the receiver, and enjoining of independent actions. These steps were all taken by the plaintiffs, and not by the receiver. He had not pledged his personal responsibility therefor, and could only have credit for volunteering payment thereof if it appeared at the close of the litigation that such amounts should be allowed plaintiffs on the ground that they had created a fund for the benefit of a class, all members of which ought to contribute to the expenses of creating that in which they are to share. See authorities cited. If, as here, plaintiffs' efforts are not productive of any such fund, no allowance could properly be made them; and the receiver's voluntary payment, as it could not have been authorized in advance, cannot now be confirmed.

Equally excluded are any expenses incurred in the litigation in circuit court and on the second appeal to this court over the rights of various classes of creditors in the funds realized and ready for distribution. There the plaintiffs, representing the general creditors, were seeking for their own benefit to resist the claim of the attaching creditors. As to that controversy the receiver was a stakeholder merely, and went outside of his duty in attempting to champion or promote either side of the controversy.

Within the second and third classes of expenditure fall, first, so much of the expenses of the first appeal as pertain to the defense of the receiver's actual possession of the property confided to him by the court. Protection of the trust fund and of his control over it is one of the primary duties of a trustee. This would be obvious if his possession were attacked by replevin, but no distinction, in reason, can be suggested when some other procedure is followed, equally effective to take from a trustee that which the court has im-

posed on him the duty to retain. *In re Luscombe's Will*, 109 Wis. 186. Here fall also the expenses of taking, arranging, and disposing of the merchandise placed in his care, and the efforts to obtain possession of the books and other assets of the insolvent corporation, including the institution of suits on the assigned accounts at the express order of the court.

From these views results that there should be allowed as credits the disbursements, other than attorneys' fees, specified by the referee's eleventh finding, aggregating $1,409.35, and, in addition, the following expenses paid by attorneys:

Fees of Commissioner Ryan on examination of Friend	$15 25
Sheriff's fees on subpœna for same	2 31
Attorney's expenses to Madison, first appeal	11 25
Fees of Commissioner McElroy on examination of Bick	12 62
Fees of sheriff on subpœna for same	2 31
Serving summons in suits on assigned accounts	2 00
Fees of clerk of court in same suits	12 00
	$1,467 09

Any other proper disbursements which may have been paid by plaintiff's attorneys are not established with sufficient certainty to justify allowance. The value of the general services of the attorneys in the course of the assignment is fixed by both Williams and Miller at $450, and no evidence justified the referee's finding of a larger amount. That sum, therefore, should be allowed as covering all services, except as further specified. The value of attorneys' services in the first appeal, so far as they related to the subject of the receiver's custody of the merchandise, are not separated, but, as they were rendered in this court, we can judge of them, and fix the value at $400, from which must be deducted the $25 taxed attorneys' fees collected by Mr. Williams. With some hesitation we affirm the referee's finding of $200 as the value of attorneys' services in commencing four suits on the assigned accounts and in conduct-

ing the same to their ultimate discontinuance. We thus find proper total credits for attorneys' fees of $1,025, and for other disbursements of $1,467.09. Thus the balance in the receiver's hands, of moneys actually received by him, $8,151.87, after deducting all permissible credits, is the sum of $5,659.78. This has been in his hands at least since October, 1895, when he appropriated the last of it to his private use. At that time the litigation was practically at an end, the right of the attaching creditors to priority in payment had been established by this court, and the futility of further procedure against the assignees of accounts was as obvious as at any time, though actual dismissal did not occur till April, 1896. No reason is apparent why the receiver should not have accounted as early as the time when he misappropriated the balance of some $2,500 to his own use. When the moneys of the trust are actually diverted to the trustee's own use, he should ordinarily be charged compound interest thereon. In this case, however, considerably more than half of the balance for which he must respond was not so converted, but had been unjustifiably paid to others by misunderstanding of his duty. It may also be noted that not until later was committed the grossest of the misconduct which has constrained us to disallow all compensation to the receiver. In the exercise of the discretion permitted courts, we shall not impose compound interest, but shall hold the receiver to account for simple interest upon the whole balance from November 1, 1895.

It hardly needs statement that upon the receiver's appeal we find no assignment of error which can be sustained. No claim of his was denied which ought to have been allowed.

By the Court.— Upon the appeal of *Morris Speiser*, the order of the superior court is affirmed. Upon the appeal of *Merchants' Exchange Bank* and *Kalamazoo Knitting Company*, that order is reversed, and the cause remanded with

directions to enter an order requiring the receiver to pay to the clerk of that court the sum of $5,659.78, with interest from November 1, 1895, and for further proceedings according to law.

MILLS, Respondent, vs. CONLEY, Appellant.

May 1—May 21, 1901.

110	525
112	[6]200
112	[7]202
110	525
113	258
110	525
116	[7] 69

Bicycles: Collision at highway crossing: Negligence: Failure to look: Special verdict: Appealable orders: New trial: Practice: Presumptions: Costs.

1. Plaintiff, while traveling over a street at a crossing, was injured by being run into by defendant on a bicycle. The accident occurred at night, and plaintiff, who was carrying an open umbrella and stooping down, did not look in either direction before starting to cross the street. A witness testified that he was seventy-five to one hundred feet away, but saw both plaintiff and defendant just before the accident; and defendant testified that an arc light was at the place, and that he saw the plaintiff when he came within sixty or sixty-five feet of him. *Held*, that a finding of a special verdict that plaintiff *could not*, by the exercise of ordinary care, under the existing circumstances, have seen defendant in time to have avoided the accident, was not supported by the evidence.
2. In such case, where there was evidence to sustain a finding of the special verdict that the plaintiff was guilty of contributory negligence which was the proximate cause of the injury, and the whole verdict, except said finding as to whether plaintiff *could not* see the defendant, was allowed to stand, defendant's motion for judgment should have been granted.
3. Under subd. 1, sec. 3069, Stats. 1898, an order denying a motion for judgment on a special verdict does not prevent "a judgment from which an appeal might be taken," and is not appealable.
4. In an action for injuries received by being run into by defendant on a bicycle, a finding that plaintiff was guilty of a want of ordinary care which proximately caused the accident is *held* not to be contrary to the undisputed evidence.
5. Such finding is not mere surplusage, nor contrary to a finding that plaintiff could not, by the exercise of ordinary care, under the cir-

cumstances, have seen the defendant in time to have avoided the accident.

6. Where one party obtains an order setting aside a verdict as against the evidence and granting a new trial, it is error to impose costs on the other party.

7. When the trial court fails to state in the order the reasons for setting aside a verdict and granting a new trial, the presumption is that it was granted because the court thought the verdict was against the weight of the evidence.

APPEAL from orders of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Appeal from order denying motion for judgment dismissed; order granting new trial reversed.*

For the appellant there was a brief by *L. A. Thompson* and *Blatchley & Burke*, and oral argument by *A. H. Blatchley*. They contended, *inter alia*, that footmen have no right to a street crossing superior to teams, and that it is negligence to attempt to cross a street whereon are moving vehicles without looking in both directions. *Barker v. Savage*, 45 N. Y. 191; *Belton v. Baxter*, 54 N. Y. 245, 247; Clementson, Wheelmen, § 114; *Savage v. Gerstner*, 36 App. Div. 220; *Cotton v. Wood*, 8 C. B. (N. S.), 568; *East Chicago F. Co. v. Ankeny*, 19 Ind. App. 150; *Fuller v. Dederick*, 35 App. Div. 93; *Niosi v. Empire S. Laundry*, 117 Cal. 257; *Curtin v. Metropolitan St. R. Co.* 22 Misc. (N. Y.), 83; *Gaudin v. Carthage*, 59 Hun, 619; *Cawley v. La Crosse City R. Co.* 101 Wis. 145. A bicycle is a vehicle, and, equally with a carriage or other vehicle, is entitled to the rights of the road. *Holland v. Bartch*, 120 Ind. 46; *Mercer v. Corbin*, 117 Ind. 450; *State v. Collins*, 16 R. I. 42; *Taylor v. Goodwin*, 4 Q. B. Div. 228; Elliott, Roads & S. (1st ed.), 635; Clementson, Wheelmen, § 99.

For the respondent the cause was submitted on the brief of *Herbert Kinne*.

CASSODAY, C. J. This is an action to recover damages for personal injuries sustained by the plaintiff while walking

west upon the sidewalk on the south side of State street, and when in the act of crossing Thirteenth street, by being struck by a bicycle upon which the defendant was at the time riding. The accident happened about nine o'clock on the evening of September 4, 1898. Issue being joined and trial had, the jury returned a special verdict to the effect: (1) that the bicycle ridden by the defendant southerly on Thirteenth street, September 4, 1898, collided with the plaintiff when upon the street crossing, and threw him with such violence upon the ground as to cause the injuries of which he complains; (2) that the defendant did see the plaintiff walking west on State street in time so that, by the exercise of ordinary care, he could have avoided the accident; (2½) that the defendant was guilty of negligence which was the proximate cause of the plaintiff's injury; (3) that the plaintiff could not, by the exercise of ordinary care, under the existing circumstances, have seen the defendant riding down Thirteenth street on his wheel in time to have avoided the accident; (4) that a person of ordinary intelligence and prudence, in the exercise of ordinary care, under the circumstances existing at the time and place of the accident, ought to have reasonably expected that the attempted passing of the defendant upon his bicycle by the plaintiff at the time might probably result in such injury to the plaintiff as occurred; (5) that the plaintiff was guilty of a want of ordinary care, which proximately caused or contributed to such collision; (6) that such collision and injury were not caused without any negligence on the part of either of the parties; (7) that they assessed the plaintiff's damages at $450.

Thereupon the defendant moved the court to set aside the third finding of the special verdict, for the reason that the same was not sustained by the evidence, but was contrary to the undisputed evidence in the case, and for judgment in favor of the defendant on the remainder of the special ver-

dict. At the same time the plaintiff moved the court to set aside the fifth finding of the special verdict, for the reason that it was not supported by the testimony in the case, but was contrary to such testimony and the law; and that the fifth finding was mere surplusage, and contrary to and inconsistent with the third finding of the special verdict; and for judgment in favor of the plaintiff upon the special verdict with the fifth finding thereof set aside; and, in case of the denial of such motion, then the plaintiff moved the court for an order setting aside the special verdict, and the whole thereof, and for a new trial of the action, upon the grounds: (1) That the fifth finding was not sustained by the evidence in the case, and was contrary to such evidence; and (2) that the fifth finding was inconsistent with the third finding of the special verdict; and (3) that the fifth finding was contrary to law and the instructions of the court pertaining thereto.

Thereupon the court overruled and denied the defendant's motion, "with costs," and entered an order accordingly, from which the defendant has appealed to this court. The court also entered an order overruling and denying the plaintiff's motion to set aside the fifth finding, and for judgment, but granted, "with costs," the plaintiff's motion to set aside the special verdict, and the whole thereof, and for a new trial of the action. From the order setting aside the special verdict and granting a new trial, the defendant appeals to this court.

As indicated in the statement, the jury, by the third finding, found that the plaintiff *could* not, by the exercise of ordinary care, under the circumstances, have seen the defendant in time to have avoided the accident. The question did not call for an answer as to whether the plaintiff ought to have seen the defendant, but whether he "could" have seen him by the exercise of ordinary care. The plaintiff testified to the effect that it was at the time sprinkling, and

that his umbrella was up as he passed west onto Thirteenth street; that he heard a noise sounding like a bell, and he then looked to the south, and about the same time was struck and knocked down; that he could not remember looking in either direction before starting to cross the street, nor before he heard the bell; that when he heard the noise he stopped and looked to the south; that he thought he did not step back, but that, if he was in the act of taking a step when he heard the noise, then the step was not taken. A witness testified in behalf of the plaintiff that he was at the time on the south side of State street, and seventy-five to one hundred feet west of Thirteenth street; that he saw the plaintiff coming with his umbrella, stooping down; that he heard the bicycle bell ring, and just then he heard the crash; that the defendant came down about the middle of the street, and seemed to be dodging around toward the east, to get around the plaintiff, when he ran into him. The defendant testified that there was an arc light at the corner of State and Thirteenth streets; that he saw the plaintiff when he came within sixty or sixty-five feet of him. Thus it appears that the plaintiff "could" have seen the defendant had he looked, and there is no evidence to support the finding that he could not. Whether he ought to have seen him by the exercise of ordinary care is another question.

Assuming that there is evidence to support the fifth finding, to the effect that the plaintiff was guilty of contributory negligence which was the proximate cause of the injury, then, if the whole verdict, except the third finding, had been allowed to stand, the defendant's motion for judgment should have been granted. But we must hold that the order denying that motion is not appealable. It certainly did not "prevent a judgment from which an appeal might be taken," and so does not come within the first subdivision of sec. 3069, Stats. 1898. As that section formerly read, it

might have been claimed that it involved the merits of the action, or some part thereof, and hence was appealable under the fourth subdivision of that section, as held in *Robinson v. Washburn*, 81 Wis. 404, and *Murphey v. Weil*, 86 Wis. 643. But the ground for taking such appeal has since been taken away by statute. Subd. 4, sec. 3069, Stats. 1898. We cannot hold that the fifth finding is contrary to the undisputed evidence. That is sufficiently indicated by the evidence referred to. Nor can we hold, as contended, that it is mere surplusage, nor that it is necessarily contrary to the third finding of the jury.

The rule of law is well settled that the granting of a new trial is very much in the discretion of the trial court, and that its order granting the same will not be reversed unless there clearly appears to have been an abuse of such discretion. The only exception to such rule is where it affirmatively appears upon the record that such order was based upon a misapprehension of the law. *McCann v. Ullman*, 109 Wis. 574, and cases there cited. We cannot say that it affirmatively appears from the record in this case that the setting aside of the verdict and granting a new trial was based upon a misapprehension of the law applicable to the case. *Id.; H. S. Benjamin W. & C. Co. v. Merchants' Exch. Bank*, 63 Wis. 470; *Kayser v. Hartnett*, 67 Wis. 250. Nor does it appear that the verdict was perverse. Nor can we say that such ruling was an abuse of such discretion. The order setting aside the verdict and granting a new trial is, however, erroneous, in that it imposes costs on the defendant. The general rule is that a verdict should only be set aside as against evidence, and a new trial granted, upon condition that the party obtaining the new trial shall pay the costs of the former trial. *Emmons v. Sheldon*, 26 Wis. 648; *Pound v. Roan*, 45 Wis. 129; *J. & H. Clasgens Co. v. Silber*, 87 Wis. 357; *Wilson v. Eau Claire*, 89 Wis. 47.

The trial court having failed to state in the order the rea-

sons for granting a new trial, the presumption is that it was granted because that court thought the verdict was against the weight of evidence; and in such case it is error not to impose terms. *Schraer v. Stefan*, 80 Wis. 653; *Garny v. Katz*, 86 Wis. 321; *Cameron v. Mount*, 86 Wis. 477. We must hold that the setting aside of the verdict and granting a new trial without requiring the plaintiff to pay the costs of the former trial was error.

By the Court.—The appeal from the order of the superior court of Milwaukee county denying the defendant's motion is dismissed; the order of the superior court of Milwaukee county setting aside the verdict and granting a new trial, "with costs," is reversed, and the cause is remanded with direction to enter an order granting such new trial upon the plaintiff paying the costs of the former trial, and for further proceedings according to law.

THE WISCONSIN TRUST COMPANY, Receiver, Respondent, vs. JENKINS and another, imp., Appellants.

May 1—May 21, 1901.

Receivers: Supplementary proceedings: Authority to institute action.

A receiver, appointed in supplementary proceedings, is expressly authorized by sec. 3035, Stats. 1898, to bring an action to set aside fraudulent transfers of property, and it is unnecessary to obtain authority therefor from the court.

APPEAL from an order of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

Appeal from an order overruling a demurrer to the complaint on the ground that the plaintiff had no legal capacity to sue because he had obtained no authority from the court to bring the action.

W. O. Thomas, for the appellants.

Edgar L. Wood, for the respondent.

WINSLOW, J. The plaintiff was duly appointed receiver of the estate of *David Jenkins* in the course of certain supplementary proceedings, and brings this action as such receiver against *Jenkins* and his wife and one Viola Joyce for the purpose of setting aside certain alleged fraudulent transfers of property made by *Jenkins* to his wife and the defendant Joyce. The complaint contains no allegation that the plaintiff was authorized by the court to bring the action. The defendants *Jenkins* and wife demurred to the complaint on the ground that the plaintiff had not legal capacity to sue because he had obtained no authority from the court to bring the action, and appealed from an order overruling such demurrer.

The case is ruled by the decision in the case of *Barker v. Dayton*, 28 Wis. 367, where it was distinctly held that the receiver is expressly authorized by the statute to bring such an action. The statute under which that decision was made is substantially the same as the provision now contained in sec. 3035, Stats. 1898. If the statute confers express authority, it is plain that it is unnecessary to obtain authority from the court.

By the Court.—Order affirmed.

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HENCKE, Respondent, vs. ELLIS and another, Appellants.

May 1—May 21, 1901.

Master and servant: Personal injuries: Negligence: Contributory negligence: Assumption of risk.

1. A complaint alleged, among other things, that plaintiff, a carpenter, was employed by defendants to repair a roof; that while standing in the gutter at the edge of the roof, doing the work with one hand and holding on to the casing of a dormer window with the other, the casing broke, causing him to fall to the ground, and that

the unsound condition of the casing was unknown to plaintiff, and could not have become known to him by the exercise of ordinary care. *Held*, that plaintiff assumed the risk of the employment, and that allegations of the complaint in regard to the assurance of safety by the master, a command by him to proceed with the work in the particular way described, and the necessity for the plaintiff to work in order to support himself and family, were immaterial.

2. Allegations of the complaint in such case to the effect that the master ought to have known that the casing was insecure before sending the servant to do the work in its vicinity; that the servant relied on the master's duty in that respect without any information that the master had tested the safety of the casing; that the servant was assured that it was safe to do the work in the way directed if he exercised ordinary care, and that he exercised such care in using the casing for support as he did, the insufficiency thereof, for such purpose, being so latent as not to be discoverable by any inspection he was legally bound to make, show that the servant assumed the risk of discovering the defect in the casing, if it was discoverable by the exercise of ordinary care, and also the risk of there being a defect not so discoverable.

3. In such case, an allegation that the master made a careful examination of the building in respect to its safety to sustain the weight of a person while engaged in working upon or around it, and knew or ought to have known that the casing was liable not to stand the strain put upon it when so used by the servant, does not allege that the master knew of the unsafe casing.

4. To maintain an action by a servant against a master for an injury resulting from defective buildings, premises, or appliances, two elements must concur, viz: fault or knowledge on the part of the master, and innocence of fault, or ignorance of the danger, on the part of the servant.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Appeal from an order of the superior court of Milwaukee county overruling a demurrer to a complaint. The action was to recover compensation for a personal injury. The complaint was to the following effect: Plaintiff, a carpenter by trade, was employed by defendants — who were contractors for work of repairing buildings — to do work of that kind upon a dwelling house. Prior thereto defendants

carefully examined such dwelling house, and knew or ought to have known the age and condition thereof as regards soundness and strength to bear up the weight of a person while working around and upon it, and especially knew or ought to have known of the unsafe condition of the particular dormer window casing which gave way and was the immediate cause of the injury plaintiff received. A part of the work to be done consisted of mending the roof near a dormer window. There were three ways of reaching the place where such work was required to be done, one being to go upon the roof from the window and stand in the gutter at the edge of the roof and do the work with one hand while holding onto the window casing with the other. That was the most dangerous way of proceeding with the work, but was the one selected by defendants. Plaintiff requested defendants to furnish him with appliances or help to enable him to do the work by one of the safer methods, but they negligently refused to do so and insisted upon his proceeding by the particular method described or not at all, assuring him that such way would be safe if he exercised ordinary care. Because of the necessities of plaintiff, which required him to earn wages for the support of himself and family, and the assurance of defendants as to the safety of the method of doing the work described, he proceeded in that way; and while at work, standing in the gutter at the edge of the roof, and holding onto the casing of the dormer window with one hand and working with the other, using all reasonable care to avoid being injured, the casing suddenly broke or pulled off, causing him to fall a distance of some twenty-five feet to and upon the frozen ground, whereby he was severely injured. The unsound and unsafe condition of the casing was not known to plaintiff, nor could it have been known to him by the exercise of ordinary care. It had existed for a long time prior to the accident and was known to defendants or ought to have been discovered by them at

the time of their careful examination of the building, made prior to directing plaintiff to proceed with the work.

The demurrer was upon the ground that the complaint failed to state facts sufficient to constitute a cause of action.

The cause was submitted for the appellants on the brief of *Van Dyke & Van Dyke & Carter*, and for the respondent on that of *Geo. L. Williams.*

MARSHALL, J. The doctrine that it is the duty of the master to furnish his servant with a reasonably safe working place, and reasonably safe tools and appliances with which to do his work, is discussed at considerable length by respondent's counsel in support of the complaint, but it does not seem that such doctrine applies to the facts alleged. It is elementary that where the dangers of a servant's working place are as open to his observation and knowledge as to his employer's,—having regard to the duty of each to exercise ordinary care, and the *quantum* of care that may be reasonably expected of each, considering the kind of work to be performed,—the servant assumes the risk thereof. The work respondent was employed to do was that of a specialist, the kind he was trained to do. He was not obliged to assume the risk of doing it in the way dictated, or excused for proceeding in that way, so as to hold appellants responsible for the safety of the casing, merely because they directed him to so proceed or assured him that it was safe to do so if he exercised ordinary care. An assurance of safety in such a case is not material except where the person giving the assurance must be presumed to have better judgment or information than the assured, so that the latter may reasonably rely thereon instead of on his own judgment. *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376; *Nash v. C., M. & St. P. R. Co.* 95 Wis. 327; *Larsson v. McClure*, 95 Wis. 533. So, leaving out the allegations that defendants examined the building and knew or ought to have known of the condition

of the casing,— which we will treat later,— no one could reasonably say but that respondent, as a specialist at work of the kind he was employed to do, must be put upon an equal plane with those who employed him, as regards all the dangers ordinarily incident thereto or discoverable by the exercise of ordinary care. In the *Showalter Case* there was a command that the servant proceed to do the work, coupled with an assurance of safety, but it was said that, since he was a man of mature years, free to decline to proceed as directed or at all, and as well informed as the master as to whether the work was dangerous or not, such command and assurance were immaterial to the question of whether the latter was guilty of actionable negligence. In *Larsson v. McClure* the court said: "The plaintiff was familiar with the kind of work he was required to perform, and had had considerable experience in that line. . . . He chose to continue work under the circumstances, instead of declining the service, and it is entirely well settled that he must be held to have assumed the risk or danger, so far as it was open for his observation," upon the principle that when danger is alike open to the observation of all, the master and servant are upon an equality and the master is not liable for an injury resulting from the employment as the work is required to be done. We must hold that those elements in the complaint in regard to the assurance of safety and command to proceed with the work in the particular way described, and the necessity for respondent to work in order to support himself and family, are immaterial. They do not even aid in making out a cause of action against appellants.

It clearly appears by the complaint that the alleged defect in the casing was not apparent by observation; that it was latent. The allegation that appellants knew or ought to have known of it means no more than that, because they made a careful examination of the building in respect to its

safety to sustain the weight of a person while engaged in working upon or around it, they ought to have discovered that the casing was liable not to stand the strain that might be put upon it by a person while making repairs and using it as a hand-hold by which to steady himself. The allegation falls far short of stating that appellants knew of the unsafe casing. Unless the conclusion pleaded, that they ought to have known of the danger notwithstanding its latent character, merely because they examined the casing, and notwithstanding such a discovery could not have been made by plaintiff by the exercise of ordinary care, is warranted, clearly, no cause of action is stated in the complaint. In determining the amount of care required by respondent in order to come up to the legal standard under the circumstances, it must be noted that, while the complaint states, in effect, that appellants examined the casing as regards its safety, before respondent was directed to proceed, it is not alleged that they informed respondent thereof. Nothing appears to indicate more than that respondent proceeded in the particular way alleged, upon the general assurance that it was a safe way if he exercised ordinary care. If it appeared that appellants informed him that they had examined the casing and that it was safe, or that he knew that they had made such examination, and that he used it as a hand-hold on the faith thereof, a different question would be presented. As the complaint stands we find nothing therein that relieved respondent from the duty of examining the casing for himself as to its ability to stand the strain it was liable to be subjected to, before commencing his work. He well knew that the work was dangerous in itself, and that he must necessarily use great caution to prevent falling from the building. No one knew that better than he did. In the absence of any circumstance indicating to him that the safety of the casing had been tested by appellants for the use to which he was liable to subject it, it was

clearly his duty to test it and discover its condition if ordinary care would do that, if duty to make such a test devolved upon any one. If the exercise of such care would not have resulted in discovering the danger which caused the mischief, then actionable negligence cannot be predicated on the failure of appellants to make the discovery, and respondent's injury must be attributed to pure accident. In *Carey v. Sellers*, 41 La. Ann. 500, the true rule governing cases of this kind is very tersely stated in the syllabus, which is a correct summary of the discussion of the subject and conclusion of the court found in the opinion:

"To maintain an action by a servant against a master for an injury resulting from defective buildings, premises, or appliances, two elements must concur, viz.: fault or knowledge on the part of the master; innocence of fault, or ignorance of the danger, on the part of the servant."

Our conclusion is that the complaint fails to charge more than that defendants ought to have known that the window casing was insecure before sending plaintiff to do the work in the vicinity thereof, where he was liable to take hold of it for support; that he relied on their duty in that respect without any information that they had tested the safety of the casing, merely because they assured him that it was safe to do the work in the way directed if he exercised ordinary care; that he did exercise such care in using the casing for support as he did, because the insufficiency thereof for such purpose was so latent as not to be discoverable by any inspection which he was legally bound to make. The idea seems to be that the assurance given respondent absolved him from the duty of paying any particular attention to the safety of the casing before using it for support, while it seems that, in view of the dangerous character of the work, such assurance, coupled with the condition that he must use ordinary care, clearly suggested that he should, for himself, inspect the casing, reasonably, as to its suitableness for the use he was to put it to. Instead of

being lulled into a feeling of security by the conduct of appellants, he was stimulated to exercise the care that one should exercise in such a situation when acting upon his own judgment. In that view, clearly, the complaint fails to state a cause of action, but on the contrary shows that respondent assumed the risk of doing the work as he did, including that of discovering the defect in the casing if it was discoverable by the exercise of ordinary care in that regard, and the risk of there being a defect not so discoverable. If such care would not have disclosed the danger to respondent, it would not have disclosed it to appellants, and the result is not attributable to the fault of any one. If they were guilty of actionable negligence in failing to make the discovery and warn respondent of it, he was as guilty of contributory negligence in not making such discovery.

The rule requiring the master to furnish his servant with a reasonably safe working place, calls only for a working place free from all dangers which a person in the circumstances of the master, in the exercise of ordinary care, ought to know of, and which, under the circumstances, the servant, in the exercise of ordinary care, is not legally chargeable with knowledge of. All other dangers which the servant subjects himself to in the line of his employment, either knowingly or ignorantly, he assumes the risk of, whether they are such dangers as are ordinarily incident to the performance of such service, or such dangers as are incident to the work as the master chooses to conduct it of which the servant's means of knowledge are equal to those of the master, having regard to the *quantum* of care which the latter is legally bound to exercise for the safety of the former and that which he is legally bound to exercise for his own safety. *Jones v. Sutherland*, 91 Wis. 587; *Erdman v. Illinois S. Co.* 95 Wis. 6, 10; *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482, 486; *Nash v. C., M. & St. P. R. Co.* 95 Wis. 327.

It follows from what has been said that respondent was, on the facts alleged, required to exercise at least as much care in examining the casing as appellants, and that, giving the allegations of the complaint the most favorable construction for him which they will reasonably bear, the trouble that rendered the working place unsafe was a defect which required some test other than that which ordinary care, under the circumstances, would suggest in order to discover it. Such being the case, no breach of duty on defendants' part is shown in that they failed to discover it. On the contrary the claim of actionable negligence is clearly repelled. It follows that the demurrer was improperly overruled.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to enter an order sustaining the demurrer and for further proceedings according to law.

STEWART, Administratrix, and others, Respondents, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

May 1—May 21, 1901.

Street railways: Eminent domain: Delay: Commencement of proceedings by owner: Parties: Adjudication in absence of finding: Appeal.

1. Where land was taken by a street-railway company in July, 1896, and the statute (ch. 175, Laws of 1897) authorizing it to institute condemnation proceedings was published April 3, 1897, and such company failed to commence proceedings for condemnation, a petition by the landowner, presented October 9, 1899, shows such delay and omission of the corporation to acquire title as to give the landowner a right to institute proceedings.
2. Ch. 175, Laws of 1897, made all provisions of the Revised Statutes relative to acquiring land by railroad companies under the right of eminent domain apply to street and electric railway companies, and sec. 1852, R. S. 1878, gave railroads the right to condemn prop-

erty on which tracks have been constructed without having acquired title thereto, and permitting the property owner to commence such proceedings on the failure of the company so to do. *Held*, that where a street-railway company had, with the owner's consent, entered upon the land before the passage of said ch. 175, either party had the right to proceed upon compliance with the terms of the statute, it being the legislative intent that the statute should apply to circumstances existing at the time it took effect.

3. Where the owner of lands had consented to the acts of a street railway in laying and operating its railway thereon, but had died before the passage of ch. 175, Laws of 1897, persons who took such lands by descent or otherwise from such owner may maintain proceedings to recover compensation under ch. 175.

4. In condemnation proceedings where no formal finding is made on a disputed question of fact as to whether the street-railway company had obtained and paid for its right of way during the lifetime of petitioners' ancestor, a formal adjudication that the petitioners are entitled to compensation, inferentially determines that question against the street-railway company, and will not be disturbed in the absence of a decided preponderance of the evidence in favor of the company's contention.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This appeal is by defendant from an order appointing commissioners in condemnation proceedings and denying defendant's motion to dismiss. It appears that prior to July 1, 1896, the land in question was owned by one Robert Stewart, and was then in possession of his tenants. On the date last mentioned the defendant surveyed, took possession of, and laid its track upon, and began to use a strip of land about sixty feet wide, more fully described in the petition, being an extension of Pennsylvania avenue south to the Chicago road, and a part of said Stewart tract. Such entry was made with the knowledge of Stewart, and without his objection. February 28, 1897, Stewart died, leaving a will devising this property to his children, and appointing his wife executrix. As such, *Mrs. Stewart* commenced this proceeding by filing a petition setting out the facts that Stewart

owned the land, his death, the taking by defendant, that no compensation had been paid and no proceedings had ever been commenced by defendant and it had never acquired title to its said right of way, and that she and the company were the only parties interested in the premises, and asking condemnation. A demurrer on the ground that the court had no jurisdiction and that the petition was wanting in facts was overruled. Thereupon the defendant answered that it was an ordinary street railway, and set up an agreement between the St. Francis Park Company and said Stewart, by the terms of which the latter, in consideration of the opening and grading of said street, the building of a fence, and the settlement with his tenants for damages to crops, agreed to convey the right of way without charge. It was further alleged that this agreement had been fully performed at considerable expense, the street had been opened and used, and no claim for compensation had been made by Stewart in his lifetime. The park company was interested in having the street railway extended to its property, and agreed with defendant to secure the right of way through the land in question. A second defense set up the death of Stewart, the making of a will, and a devise of the lands to his children. A third defense alleged payment for the right of way, and that defendant was entitled to a conveyance of the right of way, and a release of damages. Later the children of Stewart were made parties to the proceeding. *Mrs. Stewart*, having been discharged from her trust as executrix, was appointed administratrix *de bonis non* with the will annexed, and was duly brought into the proceeding in that capacity. The matter was tried by the court, and the order mentioned was made without any formal findings being filed. The chief question litigated on the trial was whether there had been an agreement between the park company and Stewart, and such part performance of it, as would warrant the court in denying

the application to condemn. The errors relied upon are: (1) That the court erred in overruling the demurrer; (2) that the court erred in denying defendant's motion to dismiss and appointing commissioners.

Thomas L. Kennan, for the appellant.

Chas. G. Woolcock, for the respondents.

BARDEEN, J. The first objection to the petition is that it does not show such delay and omission of the corporation to proceed to acquire title as to give the landowner a right to institute proceedings. The land was taken in July, 1896. The law authorizing the proceeding by condemnation was published April 3, 1897. The petition was presented in this proceeding October 9, 1899. There was a delay of two and one-half years by the company after it had a right to proceed. This certainly gave to defendant ample time to commence proceedings if it ever intended to. That it ever intended to commence such proceedings is very doubtful, in view of its claim that the right of way had already been secured by the St. Francis Park Company.

It is further urged that there is no authority of law for this proceeding. At the time the land was taken there was no law authorizing street railways to acquire right of way by condemnation. That right was granted it by ch. 175, Laws of 1897, which made all provisions of the Revised Statutes relative to acquiring land by right of eminent domain by railroads apply to street and electric railroad companies. Sec. 1852, Stats. 1898, is certainly broad enough in terms to cover a case of that kind. The company had entered upon the land with the owner's consent. He was then entitled to his action for damages in case the company did not make compensation. The statute then came into existence which gave the company a right to proceed in any case where it had constructed its roadbed or tracks without acquiring title, and, if it delayed in so doing, gave the landowner

such right. It took away the right to an injunction, and authorized the court to stay proceedings in certain cases. A new remedy was given to both parties, simple, efficacious, and prompt. It plainly applied to existing conditions, and under it this court repeatedly ruled that, when the entry was by consent, the landowner was deemed to have waived or lost his former remedy, and was relegated to his proceedings under the statute. *Milwaukee & N. R. Co. v. Strange*, 63 Wis. 178; *Walton v. G. B., W. & St. P. R. Co.* 70 Wis. 414; *Frey v. D., S. S. & A. R. Co.* 91 Wis. 309, and cases. We are clearly of the opinion that it was the legislative intent that the statute should apply to the then existing circumstances, and that it gave either party the right to proceed upon compliance with its terms.

Another point made is that the petition failed to show that the petitioners had any interest in the land when it was taken. When the case was finally heard, the widow, as administratrix, and all the children of Stewart, were before the court. Certainly, all the parties interested in the land in any way were before the court, and the several petitions filed disclose such interest. Before ch. 175, Laws of 1897, was passed, the land had descended to, and all rights of action had become vested in, the widow and children. When the court came finally to determine upon the application, there was no one in existence having any interest in the controversy who was not before the court.

The defendant further claims that the proceeding should have been dismissed because it appeared from the evidence taken that the right of way had been obtained and paid for by the St. Francis Park Company during Mr. Stewart's lifetime. This was a disputed question of fact. No formal finding upon this precise question was made by the trial judge. His failure to do so is no doubt justified by *Gill v. M. & L. W. R. Co.* 76 Wis. 293. The court did, however, formally adjudicate that the petitioners were entitled to

compensation, which inferentially determines the contention against the defendant. The evidence being in dispute, and no decided preponderance existing in favor of defendant, we do not feel at liberty to disturb the court's conclusion.

By the Court.—The order appealed from is affirmed.

CITIZENS LOAN & TRUST COMPANY, Administrator, Appellant, vs. WITTE and wife, imp., Respondents.

May 2—May 21, 1901.

Mortgages: Foreclosure: Pleading: Prayer for relief.

1. A complaint in foreclosure which sufficiently alleges that impleaded defendants have rights in the mortgaged premises, which plaintiff is entitled to have barred and foreclosed by the judgment and sale thereunder, states facts constituting a cause of action against them, sufficient on demurrer, notwithstanding other relief is demanded to which plaintiff is not entitled.
2. Prayer for excessive relief does not render a complaint demurrable.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

After the commencement of an action for foreclosure of a mortgage by one Daniel Goldstein he died, and the present appellant was appointed administrator of his estate, and filed a supplemental complaint, in the usual form, for the foreclosure of the mortgage, securing overdue notes for $2,000. In addition to the usual complaint, it is alleged that after the execution of the mortgage the mortgaged premises were sold to the defendants *Otto Witte* and *Katherine Witte*, his wife, as husband and wife, and to the survivor, and that the said *Otto Witte* and *Katherine Witte*, as part of the purchase price, assumed and agreed to pay the mortgage and notes.

It is also alleged that the defendants *Otto Witte* and *Katherine Witte*, his wife, as husband and wife, and other defendants, have, or claim to have, some interest in, or lien upon, the mortgaged premises, which interest is subject to the lien of the plaintiff's mortgage. The prayer is for revival of the suit in the name of the administrator, the ordinary judgment of foreclosure, and personal judgment for deficiency against the maker of the notes, and against *Otto Witte* and *Katherine Witte*. To this complaint these respondents interposed a demurrer, for the reason that it appears upon the face of the complaint "that as to said defendants *Otto Witte* and *Katherine Witte*, as husband and wife, said supplemental complaint does not state facts sufficient to constitute a cause of action." From an order sustaining that demurrer, plaintiff appeals.

For the appellant there was a brief by *Nath. Pereles & Sons*, and oral argument by *G. D. Goff*.

For the respondents the cause was submitted on the brief of *Fiebing & Killilea*.

DODGE, J. The ground of demurrer argued is that the allegations of the complaint are not sufficient to justify a personal judgment for deficiency against *Otto* and *Katherine Witte*. Such consideration is, however, wholly immaterial. The complaint abundantly alleges that they have rights in the mortgaged premises which plaintiff, as the owner of the mortgage, is entitled to have barred and foreclosed by the judgment and sale thereunder. This constitutes a cause of action against these respondents, and the demurrer should have been overruled, notwithstanding other relief is demanded, even if the plaintiff is not entitled to that additional relief,— a question which we do not consider or pass upon. Prayer for excessive relief does not render the complaint demurrable. *Moritz v. Splitt*, 55 Wis. 441; *Scheibe v.*

Kennedy, 64 Wis. 564, 572; *Rahn v. Milwaukee E. R. & L. Co.* 103 Wis. 467, 472.

By the Court.— Order appealed from is reversed, and cause remanded with directions to overrule the demurrer.

FOREST LAND COMPANY, Appellant, vs. BJORKQUIST and another, imp., Respondents.

110 547
116 351

May 2 — May 21, 1901.

Corporations: Promoters: Fraud: Agency: Authority.

1. Defendant B. sold a large tract of land to the plaintiff, a corporation, organized by M. for the purchase, platting, and resale of such land. Fifteen months prior to such conveyance, B., through M., had bought the land for $7,000 less than the price received from plaintiff, and authorized M. to find a purchaser for the land, his commission to be paid by the purchaser. B. did not stand in any confidential relation to plaintiff nor any of the subscribers to its capital stock. The sale to plaintiff was brought about by M., who received from plaintiff $2,000 of its stock for his services, which fact was not known to B. B., having foreclosed the purchase-money mortgage given by plaintiff, obtained a deficiency judgment thereon; and plaintiff brought an action to enjoin the enforcement of such judgment, and to have the sale set aside for fraud. *Held*, that B. did not owe plaintiff or any of the subscribers to its capital stock any duty to refrain from making said sale.
2. The mere fact that B., fifteen months prior to such conveyance, had bought the land for $7,000 less than the price for which he sold it, did not tend to impeach the transaction, especially in view of a finding that the land was then worth the full consideration recited in the deed, which was more than B. actually received.
3. In such case, the mere authority of M. to find a purchaser of the land did not contemplate the organization of a corporation to effectuate the purchase; and M.'s acts in assisting in the formation thereof, in the absence of showing that B. had any knowledge of M.'s plans, or shared in any way in his profits, were outside of the real or apparent scope of his authority and did not bind B.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

It is undisputed that in the fall of 1890 the plaintiff, through the agency of one A. B. Myers, purchased the land in question from the defendant *Bjorkquist* at the agreed price of $32,000, and paid down $16,000, of which Myers had and retained $2,000, and *Bjorkquist* $14,000, and for the balance of the purchase price the plaintiff, at the request of *Bjorkquist*, gave back a mortgage, dated October 7, 1890, for $16,000, running to the defendant *Crowns*, which was duly recorded; that, default having been made in the payment of the mortgage, October 2, 1895, *Crowns* commenced an action to foreclose the same, and March 9, 1896, took judgment on default; that there was then due on the mortgage $17,640.85; that May 31, 1897, the premises were sold on that foreclosure judgment to *Bjorkquist* for $7,500, and *Bjorkquist* thereupon took possession thereof, and July 24, 1897, a judgment for deficiency was entered in favor of *Crowns* and against the plaintiff for $11,475.56; that November 24, 1897, the plaintiff appealed to this court from that judgment for deficiency, and the same was affirmed March 22, 1898 (*Crowns v. Forest L. Co.* 99 Wis. 103); that September 21, 1897, *Crowns* commenced an action, based upon such judgment for deficiency, in the nature of a creditors' bill, to recover such deficiency from the stockholders of the plaintiff, and several of the defendants answered and put in counterclaims and cross bills, and such proceedings were had in that action that an order was entered opening such default and vacating such judgment conditionally, and allowing the question of the validity of the mortgage to be litigated; that, upon the appeal by *Crowns* from that order, the same was reversed October 11, 1898 (*Crowns v. Forest L. Co.* 100 Wis. 554); that, the *remittitur* being filed, the plaintiff moved this court for leave to prosecute its so-called

cross bill and to file a bill of review, but which motion was denied by this court February 21, 1899 (102 Wis. 97); that, as a result, this action was commenced June 12, 1899, by the plaintiff against *Bjorkquist*, *Crowns*, and Myers to enjoin the enforcement of such judgment for deficiency against this plaintiff so obtained by *Crowns* July 24, 1897, and also to set aside the transaction by which the plaintiff purchased the land from *Bjorkquist*, and also to recover back moneys paid by reason of the alleged frauds of *Bjorkquist* and Myers.

The defendants *Bjorkquist* and *Crowns* answered by way of admissions, denials, and counter allegations.

The issues thus joined were tried by the court, and at the close of the trial, in addition to the facts stated, the court found, in effect, that some time prior to June 4, 1889, one Carl Doerflinger, being the owner of the premises in question, had given to the defendant Myers, of the firm of West, Myers & Brewer, the agency to sell the land; that Myers offered the land for sale to *Bjorkquist*, and caused Doerflinger and *Bjorkquist* to come together and personally negotiate for the sale and purchase of the land; that June 4, 1889, such negotiations resulted in a written contract, signed by Doerflinger and wife and *Bjorkquist*, wherein and whereby *Bjorkquist* agreed to pay Doerflinger $500 down, and $9,500 on or before June 10, 1889, when *Bjorkquist* was to receive a deed and give back a mortgage of $13,000 to secure the payment of the balance of the purchase price; that Myers had no interest in such transaction, except to get compensation as such agent for securing such sale and purchase; that *Bjorkquist* paid the cash as agreed, and received his deed and gave back the mortgage as agreed; that, upon making such purchase, *Bjorkquist*, for a time, contemplated residing upon such premises; that in April, 1890, *Bjorkquist* gave to Myers the privilege of selling the premises at such price that he (*Bjorkquist*) should receive $30,000,— Myers getting his

commissions from the party to whom the sale should be made,—and that no other agreement was made between *Bjorkquist* and Myers in respect to such sale; that through the efforts of Myers the plaintiff was incorporated and organized in August, 1890, for the purpose of purchasing, platting, and selling the land in question; that September 15, 1890, *Bjorkquist* paid to Doerflinger the $13,000 mortgage, and the same was satisfied September 17, 1890; that about the same time the plaintiff, through the agency of Myers, agreed to purchase the land in question from *Bjorkquist*, and to pay down to him upon such purchase, in cash, $14,000, he to give a deed to the plaintiff reciting a consideration of $32,000, and take back the mortgage to *Crowns*, dated October 7, 1890, for $16,000, and the other $2,000 to be retained by Myers for effecting such purchase, in stock issued by the plaintiff; that *Bjorkquist* knew nothing about the plaintiff or its officers or stockholders, and had nothing to do about Myers's commissions, except that he conveyed the land to the plaintiff, and received from it $14,000 in cash, and the note and mortgage for $16,000, the balance of the purchase price, dated October 7, 1890; that at the time of such purchase by the plaintiff the fair market value of the premises was $32,000; that *Crowns* had no interest in the mortgage, except as trustee for *Bjorkquist;* that some of the stockholders and officers of the plaintiff company, other than Myers, knew about the time of such purchase that Myers made a profit on the purchase by the plaintiff; that the president of the plaintiff knew in July, 1897, right after the sale on foreclosure, that *Bjorkquist* only received $30,000, and that Myers received $2,000 in stock in the plaintiff corporation for making the purchase.

The court found, as conclusions of law, that the plaintiff was not entitled to any relief in this action; that the defendants *Bjorkquist* and *Crowns* were entitled to judgment dismissing the complaint as to them, with costs, and that

the defendant Myers was also entitled to judgment dismissing the complaint as to him, and ordered judgment accordingly.

From that part of the judgment so entered in favor of *Bjorkquist* and *Crowns*, the plaintiff brings this appeal.

For the appellant there were briefs by *Nath. Pereles & Sons* and *Edwin S. Mack*, and oral argument by *Mr. Mack* and *Mr. G. D. Goff*. To the point that Myers, the agent of the corporation, was pecuniarily interested in the sale as *Bjorkquist's* agent and this double agency rendered the entire transaction fraudulent, they cited Mechem, Agency, § 798; *Collins v. Case*, 23 Wis. 230; *Pickett v. School District*, 25 Wis. 551; *Shirland v. Monitor I. W. Co.* 41 Wis. 166; *Pittsburg M. Co. v. Spooner*, 74 Wis. 307; *Meyer v. Hanchett*, 39 Wis. 419, 425; *Cook v. Berlin W. M. Co.* 43 Wis. 433; *Fox v. Mackreth*, 2 Cox, 320; *S. C.* 2 Brown, Ch. 400; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Gillett v. Gillett*, 9 Wis. 194; *Munson v. S., G. & C. R. Co.* 103 N. Y. 58, 74; *White v. Sherman*, 168 Ill. 589; *Harrington v. Victoria D. Co.* 3 Q. B. Div. 549.

For the respondents there was a brief by *Turner, Pease & Turner*, and oral argument by *W. J. Turner*.

CASSODAY, C. J. The ground upon which the promoters of a corporation are accountable to it for any profits which they may receive by defrauding the corporation or from a violation of their duty as such is well understood. *Pittsburg M. Co. v. Spooner*, 74 Wis. 307; *Fountain Spring P. Co. v. Roberts*, 92 Wis. 345; *Franey v. Warner*, 96 Wis. 222; *Hebgen v. Koeffler*, 97 Wis. 313; *Limited I. Asso. v. Glendale I. Asso.* 99 Wis. 54; *First Ave. L. Co. v. Hildebrand*, 103 Wis. 530; *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481. The same is true where the owner of the property, by agreement with such promoter, and with knowledge of the facts, aids such promoter in secretly perpetrating such fraud, and

thereby receives a portion of the profits thereof. *Id.* See, also, *Yale G. S. Co. v. Wilcox*, 64 Conn. 101; *S. C.* 25 L. R. A. 90, and note; *Atwool v. Merryweather*, L. R. 5 Eq. 464; *S. C.* 37 Law J. Ch. 35; *Phosphate S. Co. v. Hartmont*, 5 Ch. Div. 394. It is contended that, within the ruling of some of the cases cited, the judgment in this case should be reversed. Confessedly, Myers was a promoter of the plaintiff corporation. Whether he secretly retained $2,000 of the consideration recited in the deed from *Bjorkquist* to the plaintiff, or whether some of the officers and stockholders of the corporation knew that he retained that amount of the consideration on such purchase, are questions not before us on this appeal, since there is no judgment in the record in favor of Myers,— much less, any appeal from such judgment. There is no pretense that the defendant *Crowns* had any connection with the purchase of the land from Doerflinger by *Bjorkquist*, nor the sale and conveyance of the land to the plaintiff by *Bjorkquist*, except that the mortgage was taken back in his name in trust for *Bjorkquist*. The purchase of the land by *Bjorkquist* from Doerflinger was fourteen months prior to the incorporation of the plaintiff; and the findings and the evidence preclude the suggestion that such purchase was made through the agency of Myers, for the purpose thereafter of selling to the plaintiff at a profit. As indicated in the statement, Myers brought Doerflinger and *Bjorkquist* together, and they personally negotiated the terms of the transfer, which resulted in the payment by the latter of $23,000, of which sum Myers retained $500 as compensation for such agency, and the balance was finally received by Doerflinger. Myers had no interest in the land or in the purchase from Doerflinger, except to get such compensation. In the spring of 1890, ten months after such purchase, and before the question of incorporating the plaintiff company was mentioned to *Bjorkquist*, he was the absolute and sole owner of the land, subject only to his payment of the mort-

gage he had given to Doerflinger for the balance of the purchase price. Such were the conditions existing when, according to the findings of the court, Myers met *Bjorkquist*, in April, 1890, and asked him for the privilege of selling the land; and *Bjorkquist* gave him the privilege of making such sale, on condition that he must receive $30,000 net as consideration for the sale, and whatever should be paid in excess of that sum Myers was to receive as his commission on such sale. Myers testified that he then mentioned the proposed incorporation of the plaintiff, and that he would have a commission of $2,000 for his services in the transaction. That is denied by *Bjorkquist*, and there is no pretense that he ever had any dealing in respect to the sale with any representative of the plaintiff other than Myers. *Bjorkquist* so employed Myers simply to find a purchaser, not to collect any part of the purchase price. The articles of the incorporation of the plaintiff are dated August 2, 1890, and were recorded August 4, 1890; and the first meeting of the directors of the corporation was therein fixed, and was held August 14, 1890. At that meeting it was resolved that the president (R. J. Schwab) and secretary (A. B. Myers) of the plaintiff be, and they were thereby, authorized and directed to purchase of *Bjorkquist* the land in question, and to pay therefor $32,000, of which $16,000 was to be paid on the delivery of the deed and approved abstract of title, and for the balance to give back a mortgage of $16,000, payable in five years, with interest at six per cent. The deed from *Bjorkquist* to the plaintiff was executed September 15, 1890, and on the same day Myers, as secretary of the plaintiff, paid *Bjorkquist* on such purchase $8,120, and took his receipt therefor; and on the same day *Bjorkquist* paid to Doerflinger the amount of the mortgage he had given him, and obtained his discharge thereof. *Bjorkquist* testified that he first ascertained that a corporation was to be the purchaser of his land a few days prior to September 15, 1890, when his deed was so executed to the

plaintiff. The findings of the court are abundantly supported by the evidence. The mere fact that *Bjorkquist* fifteen months prior to such conveyance bought the land for $7,000 less than the price for which he sold it does not tend to impeach the transaction, especially as it is found by the court, upon competent evidence, that it was then worth the full consideration recited in his deed, which was $2,000 more than he actually received. *Milwaukee C. S. Co. v. Dexter*, 99 Wis. 214, 230, and cases there cited. Neither of the appellants stood in any confidential relation to the plaintiff or any of the subscribers to its capital stock and hence owed neither it nor them any duty to refrain from making the sale under the circumstances stated. *Id.* The facts found and proved bring the case squarely within the ruling of this court in *Godfrey v. Schneck*, 105 Wis. 568. In pursuance of the ruling in that case, we must hold that the mere authority of Myers to find a purchaser of the land did not contemplate the organization of a corporation to effectuate the purchase, and that Myers's acts in assisting in the formation thereof, in the absence of evidence showing that *Bjorkquist* had any knowledge of Myers's plans or shared in any way in his profits, were outside of the real or apparent scope of the authority of *Bjorkquist*, and not binding upon him.

By the Court.— The judgment of the circuit court is affirmed.

MURRAY HILL LAND COMPANY, Respondent, vs. MILWAUKEE LIGHT, HEAT & TRACTION COMPANY, Appellant.

May 2 — May 21, 1901.

Street railways: Deeds: Construction: Plats: Dedication of highway: Revocation: Reference in deed: Ambiguity: Parol evidence: Practical location: Change of grade of street: Damages: Release: Notice: Innocent purchaser: Injunction: Rights of abutting owner.

1. Plaintiff in platting its lands indicated a street called W. street, and after recording such plat sold lots fronting thereon, many of which, as well as many of those retained, had no access to any other street or alley. Before the recording of such plat plaintiff executed and delivered to a railroad corporation, the predecessor of defendant, a warranty deed granting "the right to construct, build, and operate a railroad . . . upon, over, and along that certain tract, piece, or parcel of land . . . known as W. street . . . according to the plat" of plaintiff, and therein released the railroad corporation from damages occasioned by the "construction, operation, and maintaining a railroad upon said street." In consideration of being allowed to construct its road thereon, the railroad company agreed to grade and prepare W. street for public use, with a space on each side of its tracks for vehicles and for the construction of sidewalks, which was done. *Held*, that the railroad company was not thereby granted the exclusive use of W. street for railroad purposes, and that the deed did not operate as a revocation of an incomplete dedication but granted to the railroad company the right to lay and maintain its tracks upon a strip of land, which was, as between the parties, a street, and which was intended to remain such.
2. Where a land company granted a railroad corporation the right to construct and operate a railroad on a strip of land known as W. street, according to the plat of said land company, the reference in the deed to the plat, in the absence of any indication of intention to abandon or supersede the plat, is not simply for the purposes of description and location, but imports the plat into the deed, and as between the parties to the deed the strip of land is a street.
3. Where a land company granted a railroad corporation the right to construct and operate its railroad on W. street, words in the deed granting it "all the rights incident to and necessarily and com-

monly used in connection with the operation of a railroad," at most introduce an element of uncertainty and ambiguity, rendering admissible parol evidence of the circumstances and situation surrounding the parties at the time of the grant.

4. Such provision in the conveyance to the railway company in view of the surrounding facts and circumstances is *held* not to control and overrule other clauses granting the mere right to lay and operate tracks upon the grade of an existing street, conforming substantially to the natural surface of the ground, as had theretofore been agreed upon.

5. Facts showing that said railroad corporation had graded the street in accordance with such agreement, laid its tracks thereon, and occupied and operated them for about four years, present circumstances showing practical location and use, and any indefinite and ambiguous terms of the grant as to place and manner of use become thereby limited and fixed.

6. The grant being thus construed and made certain, and not being a grant of any right to the railroad corporation to change the grade of W. street, the release of damages contained in such deed is *held* to be a release only of such damages as would arise from the construction and use of the railroad in accordance with the terms of the grant, and not of such as would result from the railroad company changing the grade of the street.

7. A street-railway corporation formed under ch. 86, Stats. 1898, does not possess the powers granted by subd. 5, sec. 1828, Stats. 1898, to commercial railroads organized under ch. 87, to change the course and direction of highways, or carry them over or under its track, hence the powers possessed by the defendant to interfere with the grade of W. street must be such as it has acquired by grant.

8. Where a deed to a railroad company was ambiguous, and conferred only a limited right to operate its road in the center of a street, subject to the rights of the public to use it as a public street, and the company, after exercising the rights granted for four years, conveyed its right to defendant in the same language as was used in the original deed, the grantee, not having inquired as to the facts and circumstances surrounding the original transaction, is not entitled to claim any rights as an innocent purchaser.

9. Where a street is not within the limits of any city or village, abutting owners are entitled to an injunction restraining a street-railway company from changing the grades thereof, unless such right is acquired by condemnation proceedings under sec. 1863*a*, Stats. 1898.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

This is an action in equity by an abutting property owner to restrain the defendant from changing the grade of a certain highway, and to restore that part of the highway already changed, and for damages by reason of the acts already done. The defendant, by answer, claimed, in effect, that it had an absolute right of way over the whole of the alleged highway, including the right to change the grade thereof as might be reasonably necessary; and that the plaintiff had, for a consideration, duly released all its claim for damages by reason of the construction and maintenance of a railroad on the land in question.

The action was tried by the court. The evidence showed: That the plaintiff was a Wisconsin corporation, whose business, among other things, was the buying, selling, and improving of real estate, and that in March, 1889, it became the owner of a large tract of land lying west of the city of Milwaukee, and between that city and the village (now city) of Wauwatosa. That in April and May, 1889, it caused said tract of land to be surveyed and subdivided into lots and blocks, with streets, and a map to be made thereof, which map was duly certified by the surveyor, and acknowledged by the proprietor before June 16, 1890, and on that day submitted to the county board of supervisors of Milwaukee county for its approval, as provided by law, and duly approved by that board August 20, 1890, and duly recorded in the register's office of Milwaukee county on said last named date. That on said plat there was indicated a street called Wells street, eighty feet in width, and extending east and west through the platted lands a distance of about 4,000 feet, upon which 133 lots fronted, most of which were inaccessible through any other street; said Wells street being nearly on a line with Wells street in the city of Milwaukee, and intended to be a continuation

thereof. That another east and west street called Grand avenue appeared upon said plat, being one block south of Wells street, upon which lots also faced, and that there were a number of north and south streets marked upon said plat at intervals of 550 feet. That after the recording of the plat, August 20, 1890, the plaintiff sold many lots fronting upon Wells street, and also retained a large number of such lots, many of which lots have no access by any other street or alley. That the Milwaukee & Wauwatosa Motor Railway Company was a domestic railway corporation duly incorporated in December, 1888, for the transportation of persons and property between a point in the western limits of the city of Milwaukee at the corner of Thirty-sixth street and Wells street to the village (now city) of Wauwatosa, a distance of about three miles. That said railway company desired to build and operate its railway through the plaintiff's property, and as the result of negotiations between the railway company and the plaintiff in April and May, 1890, it was orally agreed that the plaintiff would grant to the railway company the right to construct and operate its railroad along Wells street as marked upon the plat, and that the railway company, in consideration thereof, would grade said Wells street through its full width to a grade then agreed upon between the parties, grading the outer fifteen feet upon each side for the building of a sidewalk and the center fifty feet after the manner of a highway. That in June and July, 1890, said railway company graded said highway in accordance with said agreement, the same being constructed in the form and fashion of a street as usually constructed in cities, some excavating and filling being done, but the street following the natural contour of the ground as nearly as the requirements of the operation of a railway would permit. That on July 30, 1890, when said grading was nearly completed, the plaintiff executed and delivered to the railway company a deed in the form of a

warranty deed, granting certain rights over said strip of land to said company in the following words:

"The right to construct, build, maintain, and operate a railroad with either one or two main tracks upon, over, and along that certain track, piece, or parcel of land lying and being in the town of Wauwatosa, county of Milwaukee, state of Wisconsin, known as 'Wells street,' in Murray Hill, according to the plat of said first party thereof, and situated in the northeast quarter and northwest quarter of section twenty-six (26), in said town of Wauwatosa, along, over, and upon which said tract, piece, or parcel of land the center line of the railroad of the party of the second part has been and is staked out and located along, over, and upon which the railroad of the said party of the second part is now located and graded, with all the rights incident to, and necessarily or commonly used in connection with, the operation of a railroad, whether the cars, engines, and trains of said railroad shall be operated by steam or by other motor power."

Said deed was made, however, upon the conditions, therein expressed, that if the said grantee, the Motor Railway Company, its successors, or assigns, should cease to occupy and use the premises described therein for the purposes thereby granted for five successive years continuously, or should cease for the period of five years continuously to operate its said railway, then the right of said grantee, its successor or successors or assigns, granted by said deed, should at once wholly cease and determine, and the premises should revert to the plaintiff, the grantor, freed from any and all claim or right of the said grantee, its successor or successors or assigns, therein; and said deed contained this further provision:

"And the party of the first part [the grantor] does hereby release all damages to its other lands by reason of construction and operation and maintaining a railroad upon said street hereinbefore mentioned and described."

Said deed was recorded in the office of the register of deeds of Milwaukee county on the 31st day of July, 1890.

It further appeared that soon after the execution of this

deed the railway company fully completed the grading as agreed, and that early in the year 1892 the plaintiff constructed a plank curbing between the sidewalk and the gutter on nearly the whole length of the street; that in the spring of 1892 the railway company, having constructed a viaduct over the valley of the Menomonee river directly east of said Murray Hill, proceeded to lay a double track railway over the entire length of Wells street in Murray Hill, the center line of said railway being the center of the street, and the road being laid upon the surface as previously graded, leaving fifteen feet upon each side of its tracks between the tracks and the curb in the form of an ordinary street; that said railway company operated its railroad upon said tracks in this condition until the year 1896, when it went into the hands of a receiver, who operated the same until August, 1897, when the same was conveyed by the receiver to one Clarke M. Rosecrantz, who, on December 9, 1897, conveyed the same to the defendant in this action, who thereupon took possession thereof, in both of said deeds the rights conveyed being described in the same terms as in the original deed to the railway company; that the defendant is a corporation formed in December, 1896, under ch. 86, R. S. 1878, and secs. 1862, 1863, ch. 87, for the purpose, among other things, of purchasing and operating street railways in the city and county of Milwaukee and elsewhere in the state; that, when the defendant purchased the motor company's railway in 1897, Wells street, in Murray Hill, was in the same form as it was constructed and graded in 1890, save that it was neglected and out of repair, and parts of it were washed and worn away by the action of rain, and the sidewalks obstructed by the caving in of the banks where the excavations had been made, but a part of the curbing being still in place and plainly to be seen, and the condition of the street being such as to indicate that it had been graded for use as a common public highway;

that from 1890 for several years thereafter said street was used somewhat for travel with vehicles and by people on foot, until, by reason of lack of repair, it became difficult of passage with wagons, but that portion of the same which was constructed for sidewalk purposes was in common use as a bicycle path until 1898; that in May, 1898, the defendant commenced to grade said street, cutting the same down from six to eight feet in some places and filling the same in others, thereby obstructing access to and reducing the value of plaintiff's lots fronting thereon.

Upon these facts the trial court held, in effect, that the deed of the plaintiff to the Motor Railway Company conveyed only the right to construct a railroad upon Wells street as a public highway, and that neither the railway company nor the defendant herein was entitled to occupy more than that portion of Wells street which was occupied by the Motor Company from 1890 to 1896, being not more than twenty feet in width in the center of said highway; that the plaintiff's plat, when approved by the county board of supervisors, was a complete dedication of Wells street, subject only to the limited right of the Motor Railway Company; that the Motor Railway Company was estopped from denying its previous agreement with the plaintiff, and the validity of such dedication; that the defendant took its rights with notice of the effect of the deed to the railway company and of such dedication; that neither the Motor Company nor the defendant was legally authorized to substantially change the grade of said highway; that the release of damages contained in the deed to the railway company only covered the damages resulting from the rights granted by said deed; that the alteration of the grade by the defendant constituted an unlawful appropriation of the plaintiff's property, and that it was the duty of the defendant to compensate the plaintiff before making such alterations of grade; and that the plaintiff cannot recover dam-

ages in this action, but is entitled to a judgment enjoining the operation of the defendant's railway upon any other grade than that originally constructed; and that such judgment should provide that if the defendant shall, within thirty days, begin condemnation proceedings, and prosecute the same with diligence, the court, on application, may suspend the enforcement of the injunction.

Judgment being rendered in accordance with these conclusions, the defendant appealed.

For the appellant there were briefs by *Spooner, Rosecrantz & Spooner*, and oral argument by *C. M. Rosecrantz* and *George P. Miller*.

For the respondent there was a brief by *Stark & Hansen*, and oral argument by *Joshua Stark* and *Otto R. Hansen*.

WINSLOW, J. The plaintiff in this case claims that the defendant, under its conveyances, possesses simply the right to lay its tracks and operate its cars over the center portion of a public street, with no right to substantially change the grade of such street; while the defendant makes the broad claim that it owns an ordinary railroad right of way covering the full width of the alleged street, and may change the grade at will, and make such use of the entire tract as is reasonably necessary in the operation of a steam railway, provided such acts are done in in a reasonably careful and workmanlike manner. This is the fundamental issue between the parties, and it naturally divides itself into two questions: first, what rights did the Motor Railway Company acquire under the terms of its deed of July 30, 1890? and, second, Has the defendant acquired any greater rights than those originally granted to the Motor Railway Company? These questions will be considered in the order stated.

1. The Motor Railway Company was a railroad corporation organized under the general law, and possessed the

right of eminent domain. Had it condemned the strip of land in Murray Hill now known as Wells street, it would doubtless have acquired the right to exclusively use the whole width of the strip in any manner which, directly or indirectly, contributed to the safe, economical, and efficient operation of its railroad, not interfering with the rights of the public or adjoining landowners. This would include the right to change the location or grade of its tracks. Lewis, Eminent Domain, § 584; R. S. 1878, sec. 1851. The defendant's claim is, in substance, that the deed made by the *Murray Hill Company* to the Motor Company by its terms grants just such an estate or right; that, the plat of Murray Hill not having been recorded at the time the deed was made, the deed operated as a revocation of the projected, but incomplete, dedication of Wells street to the public use as a street; and hence that the Motor Company's rights were superior and paramount to any other rights in the strip of land, and that they have been conveyed to the defendant, which now owns them. If, as matter of law, the words of the deed are clear, and must be construed as claimed by defendant, we can see no flaw in the argument. The deed was in form a deed of warranty. It did not, however, in terms convey any parcel of land, but conveyed simply "the right to construct, build, and operate a railroad with one or two main tracks upon, over, and along that certain tract, piece, or parcel of land . . . known as Wells street, in Murray Hill, according to the plat of said first party thereof, . . . along and upon which said tract, piece, or parcel of land the center line of the railroad has been staked out and located, and along, over, and upon which the railroad of said party of the second part is now located and graded, with all the rights incident to and necessarily or commonly used in connection with the operation of a railroad," whether operated by steam or other motor power. The words used seem to have been carefully chosen; doubtless with a view

to clearly define the right granted. Do they, under any fair and reasonable rule of construction, mean that the Motor Company is thereby granted the exclusive use of an eighty-foot strip of land for railroad purposes? We have been unable to bring our minds to this conclusion. If such meaning had been intended, it would have been very easy to have so indicated in simple phrase and with few words. A grant of the strip of land to be used for railroad purposes would have accomplished the purpose. But in the present grant not only is there no strip of land granted, but even the ordinary expression "right of way" is not used. The grant is of "the right to construct, build, and operate a railroad with one or two main tracks upon, over, and along a certain tract of land" known as Wells street in a certain plat. Here there appears not only an omission to grant any land, but a specific reference to a certain street as indicated upon a certain plat. It is argued that this reference to the plat is simply for purposes of description and location, but we cannot so regard it. The principle is familiar that, as between private parties, a deed which conveys lands, describing the same by referring to an unrecorded plat, in effect imports the plat into the deed, and operates to estop the grantor from closing up the streets named in the plat which are appurtenant to the property sold. The parties, by their acts, adopt the plat. No sound reason is perceived why this just principle should not apply to the parties to the deed before us, especially as nothing appears upon the face of the deed indicating any intention to abandon or supersede the plat. Not only is no such intention manifest, but in a later clause in the deed releasing damages the expression is used, "the construction, operation, and maintaining a railroad *upon said street*," thus apparently definitely recognizing the character of the strip as that of a street. Of course, there can be no question but that the parties could agree upon a limited grant, and we think it reasonably clear from the terms

of the deed itself that they did agree that the railroad company should have the right to lay and maintain two tracks upon a strip of land which was, as between the parties, a street, and which was intended to remain such.

But it is urged that another clause in the deed clearly indicates an intention to grant a complete and exclusive right of way over the whole strip, namely, the clause which gives the railroad company "all the rights incident to and necessarily or commonly used in connection with the *operation* of a railroad," whether the cars be operated by steam or other motor power. While this clause must be admitted to be in some degree inconsistent with the mere right to lay and operate tracks upon the grade of an existing street, we do not think it can be considered as controlling and overruling the meaning and purport of the clauses first considered. At the most, this clause possibly introduces an element of uncertainty and ambiguity in the deed. The other clauses remain, indicating one intent; this clause remains, indicating an inconsistent intent; and the deed becomes ambiguous and uncertain in meaning. In such a situation the rule that parol evidence of the circumstances and situation surrounding the parties at the time of the grant may and should be consulted in order to ascertain its true meaning, is applicable. *Brittingham & H. L. Co. v. Manson*, 108 Wis. 221.

When the surrounding facts and circumstances are considered, all doubt as to the intention of the parties vanishes. There is no room for two opinions. Both parties intended that the strip of land called Wells street was to be in fact a public street, and that the tracks of the Motor Company were to be laid and used in the center of such street upon a grade conforming substantially to the natural surface of the ground, and which had theretofore been agreed upon. The facts all point in that direction. They are quite fully stated in the statement of the case, and need only be referred to

here. The officials of the Motor Company knew of the platting of the land, and unquestionably knew also that the plat was before the county board for approval, as required by law, at the time the deed was made. They must have known also a fact which is very apparent, namely, that the grant of an exclusive right of way to a railroad company over the entire width of Wells street would defeat the whole purpose of the plat, and render a great part of it absolutely inaccessible. They had graded and prepared Wells street for use as a public street with appropriate spaces for sidewalks and for carriage travel, in accordance with a profile and grade agreed upon, which grade differed but little from the natural grade, and afforded access to every lot fronting on the street. They had staked out the center line of their road in the center of the proposed street after the manner of an ordinary street railroad, and in consideration of such grading and preparation of the land for use as a public street they received their grant of the right to construct and operate tracks thereon. To say that an exclusive use of the whole eighty feet was expected to vest in the railroad company under these circumstances, would be little less than absurd. But there are other circumstances which are, perhaps, equally persuasive. The right granted being, at best, an ambiguous and uncertain one on its face, and the place where the two permitted tracks are to be located and operated not being definitely fixed in the grant, it is permissible also to consider the subsequent acts of the parties in practically locating their tracks and utilizing their grant in order to determine the extent of the right granted, and determine where and how, within the limits of the strip of land named, it was intended to be used. This is the doctrine of practical location and use. Lewis, Eminent Domain, § 290; *Janesville C. Mills v. Ford*, 82 Wis. 416. It appears that the Motor Company, in 1892, laid its tracks upon the street, occupying about twenty feet in the center thereof, and oper-

ated the same for about four years, and until the company became insolvent and went into the hands of a receiver. Circumstances showing practical location could hardly be stronger. We entertain no doubt that by these facts the indefinite and ambiguous terms of the grant as to place and manner of use became limited and fixed. The grant being thus construed and made certain, it is scarcely necessary to say that the release of damages contained in the deed must be construed as a release of such damages simply as would arise from the construction and use of the railroad in accordance with the terms of the grant, and, the grant not giving the railroad company any right to substantially change the grade of the street, the release does not cover any damages resulting from such a change.

2. Passing now to the rights of the defendant company, we are unable to see how they can be held to be any greater than the rights of the Motor Company. The defendant, being a street-railway corporation formed under ch. 86 of the Revised Statutes, evidently does not possess the powers granted by subd. 5, sec. 1828, to commercial railroads organized under ch. 87, to change the course or direction of highways, or carry them over or under its track. The only powers possessed by it in this case to substantially interfere with the grade of Wells street must be those which it has acquired by grant.

Having held that the original grant to the Motor Railway Company was not, on its face, a grant of the exclusive use of the eighty-foot strip of land called Wells street for railroad purposes, but only a limited right to lay tracks and operate cars thereon subject to its use as a public street, which was at best indefinite and ambiguous in its terms, it is evident that there is no room for the defendant to claim any rights as an innocent purchaser. Its rights were defined in the deed which it received in the same terms as the Motor Company's rights were described in its deed.

These rights were on their face limited, and, under the most favorable construction for the defendant, ambiguous and uncertain. The defendant was, therefore, put upon inquiry as to the extent and meaning of the original grant, and the rights of the Motor Company thereunder. Had inquiry been made, the facts appearing in the evidence would inevitably have been ascertained. Not having inquired when the duty of inquiry was imposed, it stands in the same position as if it had been informed of all the facts which would have been ascertained. These facts it is unnecessary to repeat, as they have been already fully referred to.

Upon the conclusions reached, we see no reason to question the appropriateness of the remedy granted to the plaintiff in this action. This highway is not within the limits of any city. The defendant, although a street-railway company, has now the right of condemnation over such a highway. Stats. 1898, sec. 1863*a*. No reason is perceived why it may not proceed to condemn in the manner provided by the general statutes, and thus acquire the right to change grades. Until it does so an injunction against its further attempt to change grades without legal right, and to the great injury of the plaintiff, seems entirely proper.

By the Court.—Judgment affirmed.

CASE, Appellant, vs. FULDNER, Town Clerk, and another, Respondents.

May 2 — May 21, 1901.

Costs: Demurrer: Appeal.

1. Under sec. 2686, Stats. 1898 (providing that after the decision of a demurrer the court may permit the party interposing the demurrer to plead over or withdraw his demurrer on terms), an order awarding absolutely $10 costs on overruling a demurrer is erroneous;

such costs are only admissible as terms of leave to interpose some further plea.

2. On a general appeal from such order, no question being raised but that it was proper except as to costs, the order will be reversed as to costs and otherwise affirmed.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed in part; reversed in part.*

Appeal from an order overruling plaintiff's demurrer to defendants' answer. The order awarded absolutely to defendants $10 costs. Plaintiff appeals on the single question of whether it was error to allow such costs.

For the appellant there were briefs by *Geo. L. Williams*, and oral argument by *Glenn H. Williams.*

For the respondents there was a brief by *Henderson & Williams*, and *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders.*

MARSHALL, J. The question presented for decision is ruled in favor of appellant by sec. 2686, Stats. 1898. *Curtis v. Moore*, 15 Wis. 134; *Bishop v. Aldrich*, 48 Wis. 619, 623; *Schoenleber v. Burkhardt*, 94 Wis. 575; *Schroeder v. Richardson*, 101 Wis. 529; *State ex rel. Rice v. Chittenden*, 107 Wis. 354. The statute cited plainly indicates that special costs against a losing party, upon the decision of a demurrer, or any costs other than such as abide the final result of the action and to be taxed in the ordinary fee bill, are only admissible as terms of leave to interpose some further plea. This court has repeatedly so held in the cases cited. The appeal from the order being general, and no question being raised but that it was proper except as to the costs, it must be reversed as to that feature and otherwise be affirmed.

By the Court.—So ordered. Ordered further that costs in this court in favor of appellant be limited to clerk's fees.

TROSCHANSKY, by guardian *ad litem*, Appellant, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

May 2—May 21, 1901.

Negligence: Limitations of actions: Notice of injury: Pleading.

The limitation of time within which the notice of injury required by sec. 4222, Stats. 1898, must be served, is not a limitation upon the time within which the action must be commenced, but upon the time within which a certain prescribed act, necessary to the enforcement of the cause of action, shall be done; hence a demurrer on the ground that the action was not commenced within the time limited by law cannot be sustained, although it appears from the complaint that the notice given under sec. 4222 was not served until more than one year after the cause of action arose.

APPEAL from an order of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Action for personal injuries. The complaint sets out the facts, which, if proven, indicate that the defendant is liable for injuries sustained by plaintiff from being violently thrown from a street car on April 12, 1898. It further appears that he was a minor; that on May 7, 1900, a guardian *ad litem* was appointed; and that on May 9, 1900, a notice was served on defendant, presumably in compliance with the requirements of ch. 304, Laws 1897, now included in sec. 4222, Stats. 1898. No question is raised as to the sufficiency of the facts stated in the complaint to show a cause of action against the defendant. A demurrer to the complaint was interposed "on the ground that it appears on the face thereof that the action was not commenced within the time limited by law, for the reason that it appears that no complaint or notice of injury was served upon the defendant within one year after the happening of the event upon which said action is founded, as required by section 4222, R. S. Wis." The demurrer was sustained, and the plaintiff has taken this appeal.

For the appellant there was a brief signed by *Chas. G. Woolcock*, attorney, and *A. B. May*, of counsel, and oral argument by *Mr. Woolcock*.

For the respondent there was a brief by *Spooner, Rosecrantz & Spooner*, and oral argument by *C. M. Rosecrantz*.

BARDEEN, J. The demurrer in this action is based upon subd. 7, sec. 2649, Stats. 1898, which provides that a defendant may demur to the complaint when it shall appear upon the face thereof "that the action was not commenced within the time limited by law." In the case of *Meisenheimer v. Kellogg*, 106 Wis. 30, this court expressed doubt whether an objection that the notice required by sec. 4222 had not been given could be taken by demurrer. Further consideration convinces us that the doubt thus expressed is of such substantial character that it cannot be removed. We have said in several cases that the notice required by the statute was not a condition precedent to the cause of action, but was in the nature of a statute of limitation. *Meisenheimer v. Kellogg, supra; Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301; *Malloy v. C. & N. W. R. Co.* 109 Wis. 29. The statute does not assume to limit the *time* in which the action is to be commenced. Properly construed, it means that, although a party may have a cause of action, he shall not be permitted to enforce it unless within one year from the happening of the event upon which it is based he shall give the other party a certain prescribed notice. Giving that notice, he may commence his action within the time limited by law. *Malloy v. C. & N. W. R. Co., supra.* The limitation is not upon the time of the commencement of the action, but upon the time within which a certain prescribed act, necessary to the enforcement of his cause of action, shall be done. If this is not performed within the time so limited, he loses his right to proceed. His cause of action is gone. The statute giving the right to demur in direct terms applies

only to the time within which the action is to be commenced. It cannot be construed to cover an act deemed essential to a right of recovery, but which has no necessary relation to the time within which the action is to be commenced. The demurrer herein is based upon the facts appearing in the complaint that the notice given was not served or given until more than one year after the cause of action arose. This fact has no necessary connection with the time the action was commenced; hence a demurrer based upon that ground alone must fail.

By the Court.—The order of the superior court of Milwaukee county is reversed, and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law.

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112 [1]249

110 572
116 [7] 43

RICHARDSON, Respondent, vs. TYSON and others, Appellants.

May 3 — May 21, 1901.

Guardian ad litem: *Compensation: Disbursements: Employment of counsel.*

1. An attorney agreed to accept an appointment as guardian *ad litem* in a proposed suit, and conduct the litigation therein for his wards, for a specified sum in the trial court and for a like sum in the supreme court on appeal. After trial in the circuit court, he was paid the sum agreed upon for services in that court, and receipted in full therefor. Thereafter the opposing attorney was changed, and the guardian *ad litem's* right to appeal from a judgment adverse to his wards was opposed, and his motives impugned, and the general guardian of his wards attempted to secure his removal, and not only refused him aid but opposed all his efforts in behalf of his wards. The guardian *ad litem* nevertheless prosecuted his appeal, succeeded in reversing the adverse judgment, and vindicated and secured his wards' rights to real estate of large value. *Held*, that the guardian *ad litem* had been paid in full for his services in the trial court, but that he was entitled to compensation

for services on the appeal, independent of the agreement, the circumstances being so changed from those contemplated when the agreement was made that he was not bound thereby.

2. Where a guardian *ad litem* deems it necessary to employ counsel to assist in the litigation, it is the better practice to apply to the court appointing him for leave to do so, and such court, in granting leave, should fix the amount that may be expended for that purpose, and, if such amount proves insufficient, the court, on being satisfied of the fact, may increase it. If the guardian *ad litem* employs counsel without such order, he assumes the peril that his disbursements therefor may be disapproved.

3. In such situation, however, where no order is made, if it appears that the employment of counsel was reasonably necessary for the welfare of the wards and such as the court would have authorized in advance had application been made, reasonable expenses in that regard should be allowed, to be paid out of the wards' estate.

4. Where a guardian *ad litem* acts fairly, makes full disclosures, and does not make unreasonable demands for credit or allowance, it is within the discretion of the court to allow him compensation for his services on the hearing of his account, and, when necessary, for attorney's fees paid by him on such hearing.

5. When vehement contention as to the services and disbursements of a guardian *ad litem* is made, a situation is presented of such extraordinary circumstances as warrants the employment by the guardian of a hired advocate to assist him, and in such case there is no absolute limit to the *power* of the court to allow, as a disbursement to such guardian, attorney's fees incurred therefor.

6. Services performed by an attorney employed by a guardian *ad litem* prior to a contest over the settlement of his accounts being such as the guardian himself was in duty bound to perform, no allowance can be made to the guardian therefor as a distinctive item of disbursement, but evidence of such services is admissible as bearing on the proper allowance to be made the guardian for his services.

7. A guardian *ad litem* being an officer of the court, his compensation is to be fixed by the standard of official emoluments, rather than by the highest prices demanded and paid between individuals free to contract as they will; and in arriving at a conclusion as to the correct allowance the opinions of others in the profession of law are advisory only, and though unanimous are not controlling.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Reversed.*

Appeal by general guardian from an order of the circuit court of Milwaukee county awarding compensation to *Hamilton P. Richardson* as guardian *ad litem.* In 1894 certain real estate, vested in Virginia C. Tyson, now Ruggles, for life, with remainder to such of her children as she might appoint by will, and, in default of children, to unascertained beneficiaries, the value of which was, in round numbers, $150,000, had become seriously embarrassed by the failure of the life tenant to keep down taxes and through the anticipation by her of the rents and profits, so that loss of the entire *corpus* of the estate was imminent. Her counsel, Mr. T. W. Spence, undertook to find some plan of relief. It first occurred to him that the trusts were invalid, so that Mrs. Tyson in fact held the fee, and he determined upon an application to the court for construction of the trust. He approached the respondent, a young lawyer of not very large practice or experience, but who had won Mr. Spence's confidence for ability, explained the situation to him, and proposed that he become the guardian *ad litem* for Mrs. Tyson's minor children, exhibiting to him Mr. Spence's own preliminary brief on the question of construction, and stating to him the expectation that they would desire to have the question ultimately passed upon by the supreme court; also explaining that he (*Richardson*) would be expected to thoroughly investigate and present the law as he found it in protection of the interests of the minors, which, technically at least, were adverse to the attempt to invalidate the trusts; and further explained that, as the estate was very poor, he desired an understanding of the extent of compensation which *Mr. Richardson* should receive for such services, and stated to him that he thought $250 as entire compensation for the services to be rendered by him in the circuit court, and another $250 in the supreme court, if the question went there, would, in view of the entire situation, be reasonable. To this *Mr. Richardson* assented, with the

thought, unexpressed, as he now states, that such sum was to be paid by the plaintiff, Mrs. Tyson, but that he would have a further claim in case he realized or preserved a fund for the minors. In the circuit court *Mr. Richardson* prepared and presented a very exhaustive brief, which is conceded by all parties to have very perfectly covered the ground and presented the considerations in support of the trust fully and ably, upon which, as he testifies, he spent substantially two months of time. The trust was declared void by the circuit court. *Mr. Richardson* was paid by Mr. Spence $250, for which he gave a receipt, acknowledging it to be in full for his services as guardian *ad litem* in that court. Thereafter Mrs. Tyson, having married, through the medium of her husband, was brought in contact with other counsel than Mr. Spence, who were inclined to rest on the judgment of the circuit court. *Mr. Richardson*, being convinced that the rights of the minors had suffered by the judgment, persistently urged that the original plan should be carried out, and that those starting the proceedings should take the question to the supreme court. Two years having expired and they not being inclined to do so, he asked that they waive the requirement of an undertaking and permit him to appeal on behalf of the minors, urging as a reason therefor that it was a proper case for all costs to be defrayed out of the estate. This request was promptly refused by Mrs. Ruggles's new counsel, with intimations approximating threats that any compensation to him for further protraction of the litigation would be strenuously opposed, in terms which were understood to impugn *Mr. Richardson's* motives. He, however, did appeal, without undertaking, and was promptly met by a motion on behalf of the plaintiff, Mrs. Ruggles, to dismiss the appeal, and on behalf of a then-appointed general guardian to dismiss him from his place as guardian *ad litem*. Upon this motion he prepared a brief, and, owing to the assault appar-

ently made upon his motives and compensation, and possibility of error in his views as to the merits, he deemed it proper to submit the situation to older counsel, and did submit it to Mr. James G. Flanders, who concurred in his views as to the rights of the minors, and who, at his employment, adopting his brief, argued the motion to dismiss the appeal and so remove him, in defeating which he was successful. *Tyson v. Tyson*, 94 Wis. 225. Thereafter *Mr. Richardson* wrote a brief and argued the case on the merits in this court. The brief embodied about forty pages, and consisted largely of the investigation made in circuit court, elaborated and perfected. He was entirely successful, this court holding the trusts valid and directing a dismissal of the bill. *Tyson v. Tyson*, 96 Wis. 59. We, however, denied motion that all costs be paid out of the estate. *Mr. Richardson* then presented a petition for an allowance for his services and expenses, to be charged as a lien upon the remainder, which he had conserved. His right to any compensation, and the power of the circuit court to pass upon it, were at once assailed by the general guardian, represented by the same counsel as before. The circuit court denied the petition, whereupon *Mr. Richardson* appealed to this court, where he was represented by counsel, Mr. Charles E. Monroe. That appeal also was decided in his favor, and the matter remanded with directions to the circuit court to ascertain and fix his compensation for services and expenses and to constitute the same a lien upon the remainder, to be foreclosed in the manner indicated. *Tyson v. Richardson*, 103 Wis. 397. In the course of *Mr. Richardson's* investigation of the power of the court to reach this remainder for the purpose of compensating him, he discovered authorities in support of the power of a court of equity, having before it an estate, to bind by its judgment all interests, although some of them were contingent, and their owners not yet ascertained. The principles of these authorities were subse-

quently made the basis of a further procedure, in which *Mr. Richardson* did not participate, but which resulted in the accomplishment of Mr. Spence's original plan of disposing of the entire interest in a part of the land, and thereby producing a fund for the discharge of tax liens and the salvage of the balance of the property. *Ruggles v. Tyson*, 104 Wis. 500. After the decision in 103 Wis. 397, a trial was had upon the petition for allowance, in which *Mr. Richardson* continued to be represented by Mr. Monroe, and in which he was opposed by the general guardian, with counsel. The referee before whom the matter was tried fixed *Mr. Richardson's* total personal compensation at $3,000, less the $250 already paid him, and allowed him as disbursements $500 for Mr. Flanders's services, and $17.50 for traveling expenses, and also $650 for counsel fees of Mr. Monroe, with interest from July 19, 1897, when the petition for allowance was filed. Both parties moved for modification and change of the decision of the referee, and the circuit court, then presided over by a new judge, before whom *Richardson's* services had not been rendered, increased the allowance for personal compensation from $3,000 to $5,000, and added $50 to Mr. Monroe's counsel fees, to cover services on that motion,—all of which sums, with interest from the date fixed by the referee, amounted to $7,004.29 at the date of the order, October 30, 1900, which was adjudged to be a lien upon the interests of the remaindermen, and authorized to be foreclosed unless paid within a year. The appeal is from that order.

For the appellants there was a brief by *Rollin B. Mallory*, guardian *ad litem*, and oral argument by *Mr. Mallory* and *T. W. Spence*.

Charles E. Monroe, for the respondent.

DODGE, J. Many of the underlying principles upon which rest the rights of the claimant here, as also the limitations of those rights, are already decided, not only as the law of the state, but as the irrevocably adjudicated law of this

case, in *Tyson v. Tyson*, 94 Wis. 225, and *Tyson v. Richardson*, 103 Wis. 397. As most fundamental among these must be borne in mind that the infant is always the ward of every court wherein his rights or property are brought in jeopardy, and is entitled to most jealous care that no injustice be done him. The guardian *ad litem* is appointed merely to aid and enable the court to perform that duty of protection. *Cole v. Superior Court*, 63 Cal. 86, 89. By Circuit Court Rule IX, he must be an officer of that court, and that official character both supports him in the performance of his duties and limits his rights and conduct. His duties are of the highest character, especially when, as now, he is an attorney at law, owing not only fidelity and wisdom, but also the duty of investigation of the legal rights of his ward and advocacy thereof. The performance of his important functions has already won for this claimant commendation from this court, and it is at the express wish of all of its members that the writer of this opinion reasserts approval of the loyalty to the wards' interests, the fearlessness and courage against severe opposition and at the sacrifice of personal comfort, and the distinguished industry and professional learning and ability which have characterized *Mr. Richardson's* performance of those official duties resulting from his appointment as guardian *ad litem* down to the time of presentation of his formal demand for compensation in the sum of $5,000.

Not less in measuring the proper allowance to a guardian *ad litem* out of the estate he conserves than in strengthening his arm to conserve it must the fact be considered that he is a public officer,—a trusted attorney, aiding his own court as an official duty cast upon him by its appointment, a duty which no lawyer can with propriety decline, even though it may be compensated inadequately or not at all. A duty of public service without such compensation as would be demanded for similar labors for individuals rests upon

all members of the community, and is cheerfully performed in positions of all grades from jurymen and town supervisors upward. Especially has been recognized from earliest times the duty of lawyers to aid their courts in the protection of the helpless or the oppressed without thought of pecuniary benefit. We have indulged in thus much of generalization as to the true attitude of a guardian *ad litem*, which applies as well in some measure to other officers of courts, such as trustees, receivers, and the like, to lead up to the true rule which should guide courts in fixing the compensation and expenses which should be allowed them. As it would be the duty of an attorney, however eminent, to defend one accused of crime for the very moderate compensation now fixed by statute, or for none at all if none were allowed; as it is the duty, and, we are pleased to observe, the custom, of attorneys to serve the court in disbarment proceedings without compensation, so it is a professional duty to aid the court as guardian *ad litem*, either without compensation if the case requires it, or, when funds exist, for compensation to be measured by the standard of official emoluments, rather than by that of the highest prices demanded and paid between individuals free to contract as they will. The judge whom the claimant was called to aid was devoting his learning and ability to the public service for pecuniary reward wholly incommensurate to what the same industry, learning, and ability would have commanded at the hands of clients. It is with such illustrations, rather than with private contracts, that comparisons should be made in measuring the allowance to claimant. In another case (*Speiser v. Merchants' Exch. Bank*, *ante*, p. 506), we have taken occasion to point out the alarming tendency among officers of courts, and even of the courts themselves, towards reckless demand and allowance of unreasonable and excessive compensation out of funds within their grasp. While those remarks are far less applicable to the situation in this

case, we cannot but feel that reference to them is wise, to the end that courts may have continually in mind the peril of lapsing into the abuses mentioned.

The first contention made by appellant against the allowances to the claimant is that he is bound by contract to the sum of $500,—$250 for his services in circuit court, and a like sum in this court. The facts upon which this contention is predicated are substantially uncontroverted. They are set forth in substance in the accompanying statement of facts. *Mr. Richardson* does not dispute the accuracy of Mr. Spence's narrative of the conversation between them, nor the giving of the receipt in full upon the completion of the hearing in circuit court. We can see no escape from the conclusion that, by accepting the appointment in pursuance of that conversation, *Mr. Richardson* limited himself to the compensation of $250 for his services in the circuit court, which were performed in exact compliance with the arrangement so made. They were in no respect enhanced by any unexpected conduct on the part of others, and they were performed, and payment therefor accepted, without suggestion or intimation that he expected to receive for those services any other or further compensation. Nor did the language used by Mr. Spence fairly justify any such mental reservation or expectation as *Mr. Richardson* claims that he had, to the effect that, if a fund was found to exist and belong to his wards, he should be paid, in addition, a sum to be fixed by the court. In considering the reasonableness of this arrangement, it must not be forgotten that *Mr. Richardson* was then young in practice, with reputation for ability not widely established, and apparently without large and engrossing practice from which his attention and labors would necessarily be diverted to considerable pecuniary loss. The case was an important one, likely to attract attention, and presenting questions in the immediate line of *Mr. Richardson's* special studies, so that distinguished service therein

would be likely to be highly advantageous to him in establishing before the bar and the public his qualifications as a real-estate lawyer. There seems to us no inherent improbability, in that situation, that he would have assented to Mr. Spence's proposal, and deemed it at least reasonably beneficial to himself. We conclude, therefore, that for the services rendered in circuit court he must be held to have been paid in full, and to be not entitled to any further allowance.

At this point in the history of the case, however, the situation changed so entirely and radically from that within the contemplation of both *Mr. Richardson* and Mr. Spence that the arrangement as to rate of compensation for further services can have no application. Instead of the action being brought to the supreme court by Mr. Spence without trouble or burden of liability to *Mr. Richardson*, the plaintiff, upon the advice of new counsel, determined to rest upon the judgment of the circuit court, which had denied to *Mr. Richardson's* wards any interest whatever in the real estate involved. For a period approximating two years, *Mr. Richardson* was, of course, thrown into a situation of doubt and uncertainty as to his duty, and still more as to how it could be performed. Convinced as he was of the existence of valuable rights in his minors, and that injustice had been done them by the decision of the trial court, yet he was confronted in that conclusion with the decision of Judge JOHNSON, an equity lawyer of high repute, and with the expressed opinion of counsel of large experience and brilliant reputation, all of which might well give pause to a lawyer of his youth and limited experience. Again, he was without means to justify him in assuming the possible expenses attending an appeal, and, as he testifies, without relations with those who could furnish the necessary bond. At this stage, too, he was met with what we cannot construe otherwise than as threats of assault upon the sincerity of his motives and upon his professional integrity should he persist in further litigating the question upon

which judgment had been rendered, and was refused not only all aid in securing a decision from the ultimate tribunal, but any concessions or stipulations to remove obstacles in his path. When at last his convictions as to his ward's rights and his duty to further vindicate them triumphed over his reluctance to incur all of these obstacles, he was met by most strenuous efforts of him who had accepted, by appointment as guardian, the duty of promoting the legal rights of these minors to the utmost, to remove respondent from his position as guardian *ad litem*, and to dismiss his appeal from this court. Such things were not within the contemplation of any one when *Mr. Richardson* consented to present the rights of the minors in this court for a compensation of $250, and reversed the situation so entirely that we cannot hold him bound thereby, and therefore proceed to consider the proper measure of his compensation.

Appellant's counsel here presents two questions of law: First, he denies the right of a guardian *ad litem* under any circumstances to employ counsel at the expense of the estate, without previous order of court; and, secondly, power to impose any of the expenses of settling his account, especially the attorneys' fees in that proceeding. On neither of such contentions does the brief give us material aid. To the first are cited *Matter of Johnston*, 6 Dem. Sur. 355, and *Smith v. Smith*, 69 Ill. 308. The first of these merely declares the general practice of the surrogates in New York not to allow attorney fees to special guardians appointed on applications for administration. The latter decides in favor of the right of guardian *ad litem* to reimbursement of attorneys' fees if reasonable and reasonably necessary, although not expressly authorized. To this decision the court added, by way of caution:

"In such cases the better practice would seem to be, where the guardian *ad litem* is appointed and he believes that his ward has rights, for him to apply to the court for

leave to employ counsel; and the court should, in granting leave, fix the amount that might, if required, be expended for the purpose of the defense, which, if it, from the protracted litigation or otherwise, should prove insufficient, the court, on being satisfied of the fact, might increase the sum."

With this cautionary suggestion we entirely concur. The policy in this state, as indicated by Circuit Court Rule IX, is that attorneys be appointed to such position on the assumption that the guardian himself will be able to render the professional services necessary to any ordinary situation. Hence the employment of additional counsel can only be justified by unusual or extraordinary circumstances. If the guardian takes such step without an order of court, he assumes the peril that it may be disproved, and he be left to bear the expense personally. Nevertheless, if, after the fact, it appears that such precaution was reasonably necessary for the welfare of the minors, and such as the court would have authorized in advance had application been made, no reason is apparent why the reasonable expense should not be allowed. Much the same considerations are involved as were suggested with reference to taking appeal in *Tyson v. Tyson*, 94 Wis. 225; *Hamacker v. Commercial Bank*, 95 Wis. 359, 362; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 294; *Cole v. Superior Court*, 63 Cal. 86; *Henry v. Henry*, 103 Ala. 582.

We cannot doubt that a situation presented itself in this case which made it very seemly and prudent that the guardian *ad litem* should invoke the aid of a lawyer of eminence, ability, and experience at the time Mr. Flanders was consulted. As we have pointed out already, *Mr. Richardson's* own judgment was in antagonism to the views of Judge JOHNSON, of Mr. Spence, and of Gen. Bragg. He was a young man, who had not extended experience by which to test the accuracy of his own reasoning and judgment, and might well hesitate, however clear his conclusions, to incur further labor

and expense without confirmation from a lawyer able to supply those deficiencies. One subject to be discussed upon his appeal, as he had already been assured by Gen. Bragg, would be his own sincerity in moving it, thus rendering personal argument embarrassing and probably of lessened efficacy to his wards. In view of these considerations, and of Mr. Flanders's ability to procure the needed sureties for an appeal, we concur with the circuit court in approving reasonable expense for securing his services. As to the amount which should be allowed the guardian as a disbursement for Mr. Flanders's services, however, the action of the referee and the circuit court seems to us unwarranted by the record as now presented. Of course, we cannot, as between the counsel and his employer, even express an opinion of the reasonableness of the charge made, for Mr. Flanders is not a party and has had no opportunity to be heard, not even having been called as a witness. The services may, as intimated, have considerably exceeded what are described; but, such fact not being made to appear, we cannot consider it. We can only pass upon the amount of credit to *Mr. Richardson* for such services as he has proved to have been rendered, in the light of such knowledge as we may have of those in this court. No evidence of reasonable value was introduced on the trial below, and, since such as were proved to have been rendered came more fully under the observation of this than of the circuit court, no reason exists that we should not pass judgment upon them untrammeled by the finding of the referee and circuit court. The only services disclosed by the record outside of this court consisted in the examination and approval of *Mr. Richardson's* brief as to his right to appeal, and of his brief upon the merits of the construction of the deed under which the land was held. The claimant's testimony is that these briefs were submitted, and were returned by Mr. Flanders with his unqualified approval the same day; that the brief upon which the motions

were heard in this court was written by *Mr. Richardson*, and adopted by Mr. Flanders. The only further service was the argument in this court, performed in a single day. It must be borne in mind that, while courts may approve after the fact that which it were better to have submitted for their approval in advance, they ought not to allow themselves to be affected by contracts which the guardian may have made to allow more than they would have allowed upon such preliminary application. Had the explanation been made in advance of the character of the services desired to be obtained from Mr. Flanders, such as they now appear by the record, we cannot believe that a contract to pay $500 would have been deemed necessary, or would have been approved. We are constrained to the view that one half of this amount, $250, is liberal allowance for expense necessarily incurred by the guardian for the service which he claims to have received, and that his charges against his wards should be limited to that sum.

The second rule of law contended for, namely, that a guardian *ad litem* can have no allowance either for services or, more especially, for attorney's fees paid in the hearing on his account, is not supported by the citation of any authorities, but the contrary seems well sustained when the officer acts fairly, makes full disclosure, and does not make unreasonable demands for credit or allowance. 2 Daniell, Ch. Pr. *1411; *Kingsbury v. Powers*, 131 Ill. 182, 198; *Clark v. Anderson*, 13 Bush, 111, 116; *Bendall's Distributees v. Bendall's Adm'r*, 24 Ala. 295, 305. This obviously must be so if the guardian is to receive fair compensation for services. It would be contradictory to fix such fair and reasonable compensation if the sum so fixed must be reduced to something less by imposing on him the necessary expense of passing his accounts,—a step which his duty requires. The question whether employment of an attorney on such hearing should be compensated out of the estate as an expense is a delicate one. Only under extraordinary condi-

tions can it be proper. Usually, the guardian should be content to submit a plain statement of his services and disbursements to the court under which he has performed them, leaving to that court to fix the amount in the light of its own opportunity for observation and of any evidence it may desire. Ordinarily, vehement contention is not to be expected, and necessity for a hired advocate can hardly exist. Notwithstanding all these considerations, however, it still remains in each case a question for the court whether the extraordinary circumstances do exist to make necessary or proper such employment, and whether the services rendered by the attorney are merely those which the guardian might himself have rendered, or are such as, owing to the situation, he could not properly perform. There is no absolute limit on the *power* of the court to allow such disbursement; merely considerations restrictive of the exercise of its judgment and discretion. *Thompson v. Phenix Ins. Co.* 136 U. S. 287.

Considering, in the light of these views, the employment of Mr. Monroe, we find that the petitioner first presented his claim for allowance and compensation entirely in accord with the above suggestions, specifying no amount, but submitting the whole question to the court, upon a full and explanatory report, in July, 1897, and then devoted ten days to the investigation of the question of law whether that allowance could be made by the circuit court, and whether it could be so imposed as a lien upon the remainder in the real estate as to enforce its payment,—a field of inquiry which the court must investigate, and in which aid from the guardian was due and necessary. This petition was denied, as already stated, and an appeal taken to this court. At substantially this stage Mr. Monroe's retainer came about. As to that *Mr. Richardson* testifies:

"I employed Mr. Monroe, with whom at that time I was in partnership, to take exclusive charge of this proceeding, for the reason that I was about to go away for an indefinite

period, and be absent from the state, and also for the reason that, it being a matter in which I personally was interested, I thought it advisable to have it in charge of another attorney."

He elsewhere testified that an additional consideration was the character of the opposition to this account, which had developed out of the appointment of Mr. Mallory as general guardian, and the employment by him in that capacity of an attorney who had declared vehement antagonism to any allowance in favor of the guardian *ad litem.* Mr. Monroe wrote the brief, argued the appeal in this court, and, after the *remittitur*, conducted the trial before the referee and argument before the circuit court upon this petition for allowance, and presents a bill of $500 for his services up to the commencement of the hearing before the referee, and of $150 in that hearing, to which $50 was added by the court for the argument upon the referee's report. In the light of this evidence, we are unable to find justification for specific charge, as for a disbursement on behalf of the estate, for Mr. Monroe's services, other than upon the hearing before the referee. The earlier procedure involved nothing of fact, did not draw into consideration either the conduct or the motives of the guardian *ad litem*, and the reason given by *Mr. Richardson* for the employment of Mr. Monroe, then associated with him in partnership, was one going wholly to his own convenience. It was substantially requesting Mr. Monroe to perform *Mr. Richardson's* own duties as guardian *ad litem* during the latter's absence. That being so, and no criticism being suggested that Mr. Monroe's rendition of the services was not as effective and useful as would have been *Mr. Richardson's* own, the character and amount of those services can be taken into consideration only as bearing upon the amount of proper allowance to the guardian, and the charge as for a distinctive disbursement must be disallowed.

The hearing before the referee, however, presents an unusual and difficult situation. At that hearing the entire conduct of *Mr. Richardson* was on trial; the facts as to the detail and volume of the services rendered by him, their quality, and the embarrassments and opposition under which they were performed, all were to be investigated, and in large measure must call for extended examination and cross-examination of himself as a witness. All this would have rendered his conduct of the hearing as his own advocate highly embarrassing, if not unseemly, and to this extent we approve the action of the referee and of the court below in treating Mr. Monroe's employment and payment as a proper disbursement; nor do we see any reason to disapprove the amount of $200, fixed therefor, which is upon the basis of $25 per day.

The remaining question is whether the amount fixed by the court as compensation for the guardian's own services is reasonable from the point of view already suggested as the true one. That allowance, largely exceeding the amount fixed by the referee, so closely corresponds with the opinions of several leading members of the bar testifying as experts that we cannot avoid the conviction that the court deemed himself substantially controlled thereby, as he would be by a consensus of witnesses on other subjects. Such, however, is not the true rule as to compensation of court officers, and especially of attorneys for services of a professional character. On that subject the opinions of others in the same profession are advisory only, and, although unanimous, are not controlling. Judges are as well able to form correct opinions as are other lawyers. *Taylor v. C., M. & St. P. R. Co.* 83 Wis. 645, 648; *Remington v. Eastern R. Co.* 109 Wis. 154; *Trustees v. Greenough*, 105 U. S. 527; *Harrison v. Perea*, 168 U. S. 311, 325. Again, the record before us makes apparent that the lawyers who estimated respondent's services at $5,000 gave considerable weight to the

hypothesis that the value of the property conserved to the remaindermen approximated $150,000. This was not the fact. A mere remainder in property or in a fund is not of the same value as the fund itself. As the whole cannot be greater than the sum of its several parts, the value of the remainder can only be the balance remaining after deducting the prior estate, which, at the age of the life tenant, Mrs. Ruggles, approximates two thirds of the property, leaving value of the remainder only about $50,000. We by no means decide that this variance should make any very considerable difference in the fair value of the services rendered. *Smith v. Smith*, 69 Ill. 313. We mention it because the expert witnesses evidently gave much weight to the stated value of the estate, some of them justifying their opinions by the suggestion that three per cent. is a moderate collection fee. For both these reasons their estimates not only did not constrain the court to an allowance of $5,000, but they hardly supported it.

In view of the foregoing considerations, and of the further fact that most of *Mr. Richardson's* services not already compensated in full were performed before this court, and none of them, except the accounting, before the circuit judge who made the order appealed from, we have considered the whole subject as an original one, and reach the following conclusions: first, that the respondent is already paid in full for his services on the merits in circuit court, which, by the way, involved more than one third of all time spent by him; second, that the disbursements for expenses of travel, $17.50, should be allowed; third, that not more than $250 to Mr. Flanders and $200 to Mr. Monroe can be approved as specific expenses chargeable to the estate for services other than such as should have been performed by the guardian *ad litem;* and, fourth, that a fair and reasonable allowance to the guardian *ad litem* for all services as such, other than those in the circuit court, already compensated by payment of

$250, is the sum of $2,500, and interest on all such credits from July 19, 1897.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to enter order allowing the guardian *ad litem* for all services and expenses the sum of $2,967.50, with interest from July 19, 1897, with provisions for lien and enforcement as in the reversed order.

SHAWVAN and others, Respondents, vs. SHAWVAN, Appellant, and SHAWVAN, Respondent.

May 3 — May 21, 1901.

Fraud: Undue influence: Setting aside deed.

In an action to set aside a deed it appeared, among other things, that six months before her death, the grantee, a woman about seventy-seven years of age, made a will disposing of her property among her children; that nine days before her death, when she was weak from long sickness, two of her sons, by threats and artifice, persuaded her to destroy the will and deed the property to one of them; that the deed was so made and recorded, the sons agreeing to share the proceeds; and that two of the sons, one of whom was an attorney who drew the will, were in the city and, though near at hand, were not called in, but on various occasions, shortly before and after the deed was drawn, were prevented from seeing their mother in her last sickness. *Held*, sufficient to support findings that the deed was procured by fraud and undue influence.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Edwin S. Mack*, attorney, and *William R. Plum* and *William E. Cloyes*, of counsel, and oral argument by *Mr. Mack* and *Mr. Cloyes*.

For the plaintiffs there was a brief by *Toohey & Gilmore*, attorneys, and *K. Shawvan*, of counsel, and oral argument by *John Toohey*.

CASSODAY, C. J. It appears from the record that Mary Shawvan, a widow, seventy-seven years of age, died intestate at her home in Milwaukee, February 7, 1900, leaving, her surviving, six children, three of whom are plaintiffs in this action, and two of whom are defendants in this action, and the other, Kerillo, was a witness on the trial.

This action was commenced February 12, 1900, for the purpose of setting aside and having declared void a deed, executed by the deceased January 29, 1900, of the house and lot where she resided to the defendant *Douglas Shawvan*, and recorded on the same day, on the ground that the same was procured by the defendants by fraud and undue influence, and without any consideration. The defendants, *Douglas* and *Oscar*, each separately answered by way of admissions, denials, and counter allegations. The cause being tried, the court, at the close thereof, found as matters of fact, in effect: (1) That the mother died February 7, 1900, at the age stated, leaving, her surviving, the six children named, as her sole heirs at law; (2) that February 12, 1900, the son Kerillo, for value received, assigned, transferred, and set over all his right, title, and interest in and to all of the real estate owned by his mother to his brother *Sobieski* by proper conveyance; (3) that in 1884 the mother purchased the real estate in question for $1,800; that the property at the time of her death was of the value of $2,500, and was all the property she possessed, except a small amount of personal property; (4) that in the fall of 1899 the deceased was taken sick, and gradually grew worse up to the time of her death; (5) that January 29, 1900, the defendants, *Douglas* and *Oscar*, while present together at the home of the deceased, conspired together to procure a deed of the real estate from the deceased to the defendant *Douglas*, with the understanding between them that *Oscar* was to receive $500 from *Douglas*, and by means of fraud and undue influence, and in pursuance of such conspiracy, the defendants

on that day caused a deed of the real estate to be signed, wherein *Douglas* was the grantee and the deceased was the grantor; that at the time of signing the deed by the mother she was physically weak from long-continued sickness, which somewhat weakened her will power, and her situation and condition at the time were such as to render her unable to resist the importunities and influences brought to bear upon her by the defendants, and that the deed was not the free and voluntary act of the deceased, but was procured from her by fraud and undue influence practiced upon her by the defendants; that the procuring of the deed was so accomplished by the defendants without the knowledge of the other heirs, and was kept a secret from them by *Douglas* and *Oscar*, and that all of them, with the possible exception of the plaintiff *Mrs. Metz* were on friendly terms with the deceased; that Kerillo and *Sobieski*—two of such heirs—were in the city, and near at hand, at the time the deed was procured, and could have been easily called in; that the deceased, just prior to the signing of the deed, asked for Kerillo, but the inquiry was ignored by *Douglas;* (6) that at the time the deceased signed the deed she was not indebted to, or under any obligation whatever to, *Douglas*, the grantee therein named; that the allegations in the answer of *Douglas* that he had advanced large sums of money to assist the deceased to purchase the real estate were untrue; that, if he had advanced money, it was a very small amount, and was by the deceased repaid to him many years ago; that the $500 mentioned in the deed as consideration was not paid to the deceased, and that at the time of obtaining the deed the defendants well knew that the deceased could live but a few days or weeks at the furthest; (7) that the defendants caused the deed so obtained to be recorded in the office of the register of deeds January 29, 1900; (8) that in the summer of 1899 the deceased made her will distributing her property among all her children

except *Mrs. Metz;* that her direction as to how she desired her will drawn was written by herself, and clearly shows how she desired to dispose of her property; that *Douglas* caused such will to be destroyed a few hours before the deed was drawn, January 29, 1900; that notice of the pendency of this action was filed; that all the other material allegations of the complaint were fully proven and true.

And as conclusions of law the court found, in effect, that the plaintiffs were entitled to a judgment against the defendants vacating and setting aside the deed from the mother, Mary Shawvan, to the defendant *Douglas Shawvan*, dated January 29, 1900, and recorded on that day, and ordered judgment to be entered accordingly, together with the costs and disbursements of this action, to be taxed against the defendants. From the judgment entered thereon accordingly the defendant *Douglas Shawvan* brings this appeal.

Are the findings sustained by the evidence? It appears that the deceased had been a widow for more than twenty-seven years. She had raised a family consisting of the six children mentioned. All of them, except *Douglas*, had families of their own. Kerillo had practiced law in Milwaukee for twenty-one years. *Rinard* had been a lawyer for twenty-two years, and was located at Dennison, Iowa. *Sobieski* had resided in Janesville for eleven years, and was a traveling man. *Oscar* had resided in Belvidere, Illinois, for twenty years. *Mrs. Metz* had for some time resided in Chicago. *Douglas* was unmarried. For some time prior to May, 1884, he had been in the employ of the Chicago, St. Paul, Minneapolis & Omaha Railway Company as a switchman and brakeman, and stationed at St. Paul. May 14, 1884, he came from Elroy to Milwaukee, and a month afterwards went to Chicago, and entered the employment of the Chicago & Northwestern Railway Company, and continued in such employment until April, 1887; and since that time had been in the employment of the D. M. Ferry Company as travel-

ing agent. December 5, 1888, he bought a farm of his brother *Oscar*, for which he was to pay $1,600. Between 1888 and 1893 he bought two tracts of land, the bank carrying him on a good deal of his paper. In the meantime the deceased — the mother of those children — had secured a homestead at the price and for the value found by the court. It was all the property she possessed, except a small amount of personal property. Some time prior to August 12, 1899, she conceived the purpose of making her will, and so wrote to her son Kerillo, requesting him to draw her will, and to bring it over at his leisure, and stating therein just how she wanted to dispose of her property, and to the effect that she had "thought of it long, and considered it in all its bearings," and then, after stating that she wanted to give certain articles of personal property named to *Sobieski*, *Rinard*, and *Douglas*, respectively, she said: "All the rest of my property I want sold and divided as follows: It shall be divided into six parts: one part to *Sobieski*, one part to you, Kerly, one part to *Rinard*, one part to *Douglas*. Of the remaining two parts I want you, Kerly, to have one hundred dollars, and the balance of the two parts I want to go *Oscar*. In case either of the above-named should die before a final settlement of this instrument is completed, the part which would have been theirs I wish divided equally with those that are living. Mary Shawvan." August 12, 1899, she wrote to *Rinard* to the effect that she had so far experienced a very unpleasant summer; that she had not raised a hoe in the garden since she planted in the spring; that she had got Kerillo to write up the way she wanted her little effects disposed of in case she left any behind her; that it was, as she thought, all right; that it suited her anyhow; that she thought "every one ought to do so when they are able;" that it would "neither shorten nor prolong life." It is conceded that she made her will as stated in her letter to Kerillo, thus distributing her property to her children in substan-

tially equal parts, except that she left out her daughter, and gave *Oscar* nearly double any of the others. In October, 1899, she was taken sick. She was then living alone at her home in Milwaukee. She wrote to her son *Rinard* in Iowa, and he came; and in the last of October he took her to the home of his brother *Sobieski*, in Janesville, where she remained until January 25, 1900. During that time she gradually grew worse. December 20, 1899, she again wrote to *Rinard*, to the effect that she experienced no particular gain; that the family had been very kind, and done all they could for her, but that eight weeks were long enough; that *Sobieski*, who was a traveling man, had been home only two days, but would be there for Christmas; that *Douglas* would finish work in the South, and would be there about January 12, 1900, and then she would go home with him. *Douglas* did not get to Janesville until January 17, 1900, and he claims that his mother proposed to deed to him the house and lot if he would promise to quit work, and remain with her, and take care of her. *Sobieski* was then absent from home, traveling. The next day after *Douglas* so reached Janesville, he wrote his brother Kerillo a letter as follows:

"Janesville, Wisconsin, 1-18, 1900.

"*K. Shawvan*, DEAR BRO.:

"Mother is very low. The doctor tells me she may pass off at any time. But, to save her, she should be moved. This noise will kill her. Now be here (Sunday) sure. I will not work any more this year if I can get her home. The doctor says she can be moved all O. K. with no more danger of losing her life than one heavy noise. Now, in the name of humanity, come, and help me get her home, and I will stay there and care for her. Your Bro. DOUGLAS.

"*Let one know I wrote.*"

On the same day he wrote his brother *Rinard* this letter:

"Janesville, Wis., Jan. 18th, 1900.

"*Mr. R. Shawvan, Dennison, Iowa.*

"DEAR BROTHER: I got here yesterday after the doctor had left. To-day he came at noon, and has just left. The

conditions are this: Mother has dropsy. It started in her feet, and has gone upwards, until now it is about the hips, and may cause death at any time. It is your duty to come here now. Come prepared to stay for four or five days. There are many things I cannot write. This is or should be enough. Come and come at once.

"Your Bro. D. SHAWVAN."

Four days afterwards the deceased wrote to *Rinard* as follows:

"Have been and am still very sick. Got a good Dr., who says in a few day I can be removed to Milwaukee, which I am terribly anxious to do. Now, I'll wire you when he says I can go. Will you come and help remove me? *Dud* is here taking care of me, and must go to Milwaukee before long, and, in order to have proper care, I will go with him; but it will not be until I get Dr.'s consent. I am not intending to talk this to *Beck's* family. Please write if you will be at liberty to help. Dr. says he hopes in three or four days I will be able to go."

Three days after that, being Thursday, January 25, 1900, she was taken to her home in Milwaukee by *Douglas*.

Oscar testified to the effect: That Saturday, January 27, 1900, he came from Belvidere to his mother's house. That the next day (Sunday) *Douglas* introduced the subject of getting the deed from his mother. That a good deal transpired between himself and *Douglas* in respect to the matter. That he (*Oscar*) was to help *Douglas* get the deed, for which he was to receive $500. That the first step was to get the will which Kerillo had drawn the August before. That *Douglas* wanted to get the will to destroy it. That for that purpose he (*Oscar*) went to Kerillo's house that evening about eight o'clock to get the will. That Kerillo promised to come over to his mother's house that evening, and did, but did not bring the will. That the next morning (Monday) *Douglas*, in order to get the will, talked to his mother in regard to it, and said to her in *Oscar's* presence: "I am going to quit the ranch. I can't stay any longer. I am throwing away my time. The rest will come here and get

this property, divide it up, and I won't have anything in it. I am not going to stay." That *Douglas* then got ready to go, and his mother asked him (*Oscar*) what to do; and he told her to "give him the deed, that is the only way you can do." That the agreement between him and *Douglas* was that *Douglas* was to pay him $500, and that he had already received from him $210.

Kerillo testified to the effect that when *Oscar* came to his house for the will on Sunday evening his older brother, *Sobieski*, was there; that *Oscar* said that his mother wanted him to bring the will over; that he got there about half past nine; that *Douglas* asked him if he had the will, and he said "No;" that *Douglas* swore at him because he did not bring it; that he requested the privilege of speaking to his mother privately, but *Douglas* refused to leave the room, and became boisterous and more or less profane about it; that he asked his mother if she wanted to change her will, as he had brought paper with him; that she then expressed a desire to see her will, and he then promised to bring it to her the next morning, and did about ten o'clock; that, as he went in, *Douglas* asked him if he had the will, and when he told him that he had he said he wanted it; that he told him he could not have it, as it was his mother's will, and thereupon gave it to his mother, and requested *Douglas* and *Oscar* to leave the room, and allow him to speak to his mother privately, which *Douglas* declined to do, with profanity; that he then asked his mother if he should let *Douglas* take the will, and she said "Yes;" that *Douglas* then took the will, and read it partly through, and then said it should be destroyed; that he then told him he must not destroy his mother's will, and handed it back, and he placed it in his mother's lap, and she tore it partly through, and told them to burn it, and *Oscar* took it out of the room. Rudzinski, a notary public, testified to the effect: That *Oscar* came for him to draw the deed from his mother to

Douglas. That when he came in *Douglas* said to his mother: "This is Mr. Rudzinski. He is to draw the deed." She said, "Where is Kerly?" *Douglas* said, "We don't need Kerly. We brought Mr. Rudzinski because you know him, and you claim more confidence in him than any stranger." She said, "I thought Kerly was coming." He said, "We don't need Kerly." That he then drew the deed, and it was executed by the deceased. That when they got through he heard footsteps coming on the side of the house, and *Douglas* said: "Hurry up. Get out of the room. We will have trouble with Kerly;" and they went out.

Sobieski testified to the effect that he called at his mother's house a little before noon on that same Monday, January 29, 1900; that *Douglas* and *Oscar* were there, and the doctor was fixing his mother's limb; that he started to go in to see it; that *Douglas* shut the door, and said, "You keep out;" that he protested, and that *Douglas* became very abusive and profane, and his mother said twice, "Don't, boys," and so he bid his mother good-by, and left. *Mrs. Metz* testified to the effect that she went to her mother's house February 2, 1900, and found *Douglas* and *Oscar* there; that *Douglas* refused to allow her to go in to see her mother, and said that her mother did not wish to see her; that she told him she had come to take care of her mother, but he said they did not need any assistance; that she finally was allowed to see her, and talk with her, but was not allowed to care for her, except that, after her mother requested it, she was allowed to bathe her mother's hands and face. February 2, 1900, and four days after the execution of the deed, *Douglas* sent this telegram to *Rinard:* "Mother dying. If you want to see her alive, come." Five days afterwards she died.

The transaction of destroying the will and obtaining the deed was not only bold, but disgraceful. The will was made with thought and deliberation, and expressed the mother's desire in respect to the distribution of her property

among her children. There is no evidence of any change of her feelings or judgment in respect to any of her children after the making of her will. Nine days before her death her helpless and impaired condition was such that she could no longer withstand the threats and artifice of *Douglas* and the persuasion of *Oscar*, who had his price; and, with the other children barred from her presence, she was compelled to yield to the dominating influence of her two sons. Such a transaction cannot have the sanction of law. *Will of Slinger*, 72 Wis. 35; *Disch v. Timm*, 101 Wis. 191, 192, and cases there cited. The evidence seems to be sufficient to support the findings that the deed was procured by fraud and undue influence.

By the Court.— The judgment of the circuit court is affirmed.

LIERMANN, Administrator, Appellant, vs. MILWAUKEE DRY DOCK COMPANY, Respondent.

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111 449

May 3 — May 21, 1901.

Master and servant: Negligence: Personal injuries: Fellow-servants: Assumption of risk.

Plaintiff's intestate was employed in defendant's dock yard, and, while assisting in unloading a spar from a scow, was injured by one of the skids, over which the spar was being hauled, flying up and striking him. The accident was caused by the improper construction of the skid. The skids were constructed of timbers placed on blocks by the gang of workmen with whom the intestate was working. Neither the timbers nor the blocks were defective. *Held*, that, if the skid which flew up was improperly placed or blocked, the fault was that of a co-employee, the risk of which was assumed by the deceased.

APPEAL from a judgment of the superior court of Milwaukee county: OREEN T. WILLIAMS, Judge. *Affirmed.*

This is an action by the administrator of the estate of August Beyersdorff, deceased, on account of the death of said Beyersdorff, resulting, as alleged, from the negligence of the defendant. From a judgment of nonsuit the plaintiff appeals.

The facts appearing in the evidence were substantially as follows: The defendant is a corporation owning and operating a shipyard in Milwaukee upon the south bank of the Menomonee river, which at this point runs east and west. The deceased was a laborer in its employ in the work of the yard. On the 1st day of June, 1898, two long spars were to be unloaded from a scow in the river onto the dock of the yard for the purpose of making masts. Ernest Iwer, who was foreman of the yard, directed a gang of laborers to which the deceased belonged to take the spars from the scow, and put them upon skids upon the dock. Such work had frequently been done before. A part of the gang, in accordance with previous custom, placed two timbers, fourteen to sixteen feet long, for skids, near the edge of the dock, and at right angles with the river, and supported the same by blocks placed under them. Neither the timbers which were used for skids nor the blocks were in any way defective. After the skids were first placed in position, the west one was taken up by one or two of the gang to use as a pry, and replaced; but, when replaced, the south end of the skid projected over the blocks on which it rested about a foot. One spar was rolled off from the scow onto the skids in safety, and hauled by horses back to the middle of the skids by means of a chain around it. The deceased, with others, was then directed by Iwer to pull the scow along so as to unload the second spar upon the skids. While engaged in this work, he stepped over the north end of the west skid, and at the same time the man in charge of the horses started them up, and pulled the first spar to the south end of the skids, and the west skid, being unsupported at

the extreme end, went down at that end, and the north end flew up, and struck the deceased, inflicting injuries from which he died. There was some testimony tending to show that the foreman, Iwer, directed the teamster to pull the spar along at this time, but this was denied.

The cause was submitted for the appellant on the brief of *McElroy & Eschweiler*, and for the respondent on that of *George C. Markham*, *John F. Harper*, and *Tallmadge Hamilton*.

WINSLOW, J. The plaintiff's claim is that the defendant is liable because it failed to furnish the deceased with a safe place in which to work. It is plain, however, that this principle does not apply to the case. The evidence shows without dispute that this was a case where it was the duty of the deceased and his fellow laborers to prepare the place in which and the appliances with which they were to work. The master furnished suitable and safe materials for the purpose. The preparation of the skidway and the blocking thereof was a mere detail of the work of the gang to which the deceased belonged. If the skid which flew up was improperly placed or blocked by one of the other laborers in the gang, or if the first spar was prematurely moved, the fault was that of a co-employee, the risk of which was assumed by the deceased. *Stutz v. Armour*, 84 Wis. 623; *Van den Heuvel v. Nat. F. Co.* 84 Wis. 636; *Peffer v. Cutler*, 83 Wis. 281; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1. This is decisive of the case, and renders unnecessary the consideration of any other questions.

By the Court.—Judgment affirmed.

SMITH, THORNDIKE & BROWN COMPANY, Appellant, vs. MUTUAL FIRE INSURANCE COMPANY and others, Garnishees, Respondents.

May 3—May 21, 1901.

Garnishment: Service of summons: Failure to serve on principal defendant: Defective return: Amendment: Payment to principal defendant by garnishee: Appeal: Immaterial error.

1. Where there is a conflict of fact to be decided in order to allow the sheriff to amend his return to accord with what he declares to be the fact, there is no forum except the trial court capable of deciding it.
2. Under sec. 2756, Stats. 1898, if a garnishee summons was not served upon the principal defendant and the sheriff's return of service fails to show that after due diligence such service could not be made within Wisconsin, the service becomes void and of no effect from the beginning.
3. The service, or inability after due diligence to serve, upon the principal defendant, is not made jurisdictional, but a condition subsequent is provided whereby jurisdiction once acquired shall be lost, unless there be such service in fact within ten days, or in lieu thereof a showing in the sheriff's return or other proof of service that such service cannot be made.
4. Where prior to a motion to amend the sheriff's return in such a case the garnishees paid over the moneys to the principal defendant, the service cannot be revived and validated so as to charge the garnishee again for the money. MARSHALL, J., concurs solely because it appeared that in the interim between the service on the garnishees and the motion for leave to amend the sheriff's return, the garnishees had, by payment, ceased to be the debtors of the principal defendants.

APPEAL from an order of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

On May 25, 1897, garnishee summons was served upon the agents of the garnishee insurance companies, at Milwaukee. On November 1st it was filed with the clerk of the court, bearing the return of a deputy sheriff certifying such service, but making no mention either of service or of

any attempt to serve upon the principal defendants. Such summons was accompanied by an affidavit of Charles E. Wilde that he had served it on one of the principal defendants at Milwaukee on the 6th day of August, 1897. The garnishee action having been tried, and resulted in a judgment against the garnishees, and they having appealed, the plaintiff discovered that the proof of service upon the garnishee summons did not comply with sec. 2756, Stats. 1898, and presented affidavit of the deputy sheriff, asserting that he did in fact make diligent search, and was unable to find the principal defendants in order to serve upon them the garnishee summons, and desired to amend his return by adding that fact thereto; whereupon, on November 7, 1900, plaintiff moved the court to permit such amendment of the return. Such motion was met by a further affidavit of the deputy sheriff, made on the 13th day of December, 1897, to the effect that he made no effort to find or serve upon the principal defendants, but merely knew or was advised that neither of them was resident in Wisconsin. Meanwhile the garnishees had paid over all moneys in their hands. The motion was denied by order dated December 1, 1900, from which this appeal is taken.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *Chas. E. Wilde.*

For the respondents *Mutual Fire Ins. Co.* and *Manchester Fire Assurance Co.* there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. D. Van Dyke.*

For the respondent *Liverpool & London & Globe Ins. Co.* there was a brief by *Moe & Hansen*, and oral argument by *Otto R. Hansen.*

DODGE, J. The reason given by the judge of the superior court for denying this motion was that he had no jurisdiction to decide the conflict of evidence apparently arising from

the contradictory statements in the deputy sheriff's two different affidavits. This, of course, is no ground for the action taken. If any conflict of fact needed to be decided in order to allow the sheriff to amend his return to accord with what he declared to be the fact, there was no other forum except the superior court capable of deciding it.

But the grounds of the action taken are immaterial, in view of the conclusion at which we have arrived. The statute (Stats. 1898, sec. 2756) with reference to garnishment in the circuit court provides:

"The garnishee summons and annexed affidavit shall be served on each of the several garnishees named in the manner provided in sections 2636 and 2637 for service of a summons in an action; and, except where service of the summons in the action is made without the state or by publication, also on the defendant to the action, in like manner, either before, or within ten days after, service on a garnishee. When the defendant shall have appeared in the action by an attorney such service may be made upon such attorney or upon the defendant. Unless the garnishee summons be so served on the defendant or his attorney or the proof of service on the garnishee show that, after due diligence, such service cannot be made within the state, the service on the garnishee shall become void and of no effect from the beginning."

The garnishee summons in this case was not served upon either the principal defendant or his attorney within ten days after the service upon the garnishees, nor did the proof of service upon the garnishees which was filed in the circuit court on November 1, 1897, show that after due diligence such service could not be made within the state. Prior to the motion to amend the return, the garnishees paid over the moneys owing to the principal defendants. Upon this state of facts there seems no doubt that the last clause of the statute above quoted became effective, and the service on the garnishee became "void and of no effect from

the beginning." *Globe M. Co. v. Boynton*, 87 Wis. 619. The plaintiff seems to contend for the rule, which has been recognized time out of mind, that jurisdiction depends upon the fact of service, and not upon the proof of service, and that at any time the proof of service may be amended to show service in fact, if it really was had, except for intervening equities. That rule has no application to the question before us. The service, or inability after diligence to serve, upon the principal defendant, is not made jurisdictional, but a condition subsequent is provided, whereby jurisdiction already acquired shall be lost, and that condition subsequent is, by the exact words of the statute, either omission of service in fact within ten days on the principal defendant or his attorney, or, in lieu thereof, omission of a showing in the sheriff's return or other proof of service that such service cannot be made. *Globe M. Co. v. Boynton, supra.* The latter condition is not the fact of inability to serve, but the declaration of such fact in the proof of service of the garnishee summons.

The process of garnishment is entirely statutory. It is a harsh and extreme remedy, out of the course of the common law, and may be, and properly is, burdened with conditions in the discretion of the legislature. *Globe M. Co. v. Boynton, supra; Morawetz v. Sun Ins. Office*, 96 Wis. 175, 178. With that branch of the government rests the power and authority to impose any such conditions, and, whether wise or unwise, they should be enforced by courts. It is not difficult, however, to discover a purpose to be accomplished by the provision in question which would not be satisfied by an amendment now. If in fact the principal defendant be not served within ten days, and service be not prevented by inability to find him within the state, then the garnishee is in a predicament, upon the plaintiff's theory. If he refuses to pay to the principal defendant the amount in his hands, he may be subjected to the costs and expense of a suit in which

he can succeed only by showing that the defendant was so situated that service could not have been made upon him with due diligence. If, on the other hand, he pays over to the principal defendant, he must do so at the peril of being able to prove that the defendant was in a position so that service could have been made upon him with due diligence. It is but due recognition of the unfairness of subjecting an innocent stakeholder to a predicament of this sort that the legislature has required that if the plaintiff seeks to continue the liability of the garnishee, notwithstanding failure to serve the garnishee summons upon the principal defendant, he shall not only cause due diligence to effect such service, but shall cause it to appear by the very return itself that such due diligence has been ineffective.

Hence we conclude that the attempted service upon the garnishees in this action had, long prior to November, 1900, become void and of no effect from the beginning. It cannot now be revived and validated so as to charge these garnishees with liability again for the money which they have already paid over to the principal defendants. The court's refusal to amend affects no rights of the appellant injuriously, and should not be disturbed.

By the Court.—Order appealed from is affirmed.

MARSHALL, J. I concur in the decision in this case solely because, in the interim between the service on the garnishees and the motion for leave to amend the officer's return, such garnishees ceased to be debtors of defendants in the main action. It is elementary that an officer should be allowed to correct a mistake in his return as of course, and even without notice, when it will not do injustice to litigants or third parties, but not otherwise. The idea advanced by my brethren, that the return of service on a garnishee summons is an exception to that rule, in my judgment, would have been abandoned before it found place in

a legal opinion as a basis for a judgment had all the statutes governing the subject been taken into consideration. It has been uniformly held, independent of any enabling statute, that, subject to the limitation previously mentioned, such right of amendment exists, and that it applies to the return of service in garnishee actions the same as to any other, in the absence of a statute clearly taking away the right; that it is a common-law privilege so firmly establshed that nothing short of some pretty plain statutory enactment, showing a legislative intent to abrogate it, can be considered effective for that purpose. Rood, Garnishment, § 279; *Mayer v. Chattahoochee Nat. Bank*, 46 Ga. 606; *Mangold v. Dooley*, 89 Mo. 111; *Main v. Lynch*, 54 Md. 658. In the last case cited it was said, in substance, that the right of an officer to amend his return, and of the party interested to have him make such amendment, is in no way dependent upon any statute, but is a right guaranteed by the rules of the common law and applies to a return on a garnishee process as well as on any other; that the right can only be displaced by circumstances such that irretrievable damage to ligitants would result from its continuance.

In view of the foregoing, sec. 2756, Stats. 1898, should not be held by judicial construction to take away the right of amendment as regards the officer's return if that can be reasonably avoided. Rather, the statute should be construed in harmony with the common-law right if it can be, reasonably. Elementary principles demand that. The language of the statute is, 'The garnishee summons shall be served on the defendant in the main action within ten days after service is made on the garnishee except where the service is made without the state or by publication: provided that, if the defendant shall have appeared in the action by attorney, service may be made on him or his attorney;' and, "Unless the garnishee summons be so served on the defendant or his attorney or the proof of service on the garnishee

show that, after due diligence, such service cannot be made within the state, the service on the garnishee shall become void and of no effect from the beginning."

It does not require argument to demonstrate that such language makes service on the garnishee the jurisdictional act, and failure to make proper return, showing service upon the defendant in the main action within ten days after the former service, or that the latter service cannot be made in this state, operates to terminate jurisdiction. Upon failing to do that, the statute says, the service upon the garnishee *shall become void.* The meaning of the statute is not that the return shall be made in any particular time. My brethren do not claim that, yet say that the officer is absolutely bound by his return when once made, regardless of whether a change thereof will prejudice litigants unjustly or not. That seems a strange doctrine, out of harmony with the liberal construction that should be given to remedial legislation, and out of harmony with the strict construction that should be applied, where construction is permissible, limiting the effect of an act which interferes with common-law rights; it takes away the common-law right to amend, and does that by judicial construction. In saying this we assume that, taking the most favorable view that reason will permit in favor of the position of my brethren, the statute is open to construction. Full effect would be given to it by holding that it does not mean that an officer is absolutely bound under all circumstances by his return as first made; that it is open to amendment in accordance with the truth the same as any other return, and that, unless it shows, either when originally made or as corrected, the jurisdictional facts mentioned, the service upon the garnishee shall "become void and of no effect from the beginning." The service of any summons becomes void and of no effect from the beginning if proper proof thereof be not made or it is waived, but not necessarily because it is not made correctly

in the first instance. The idea is new that proof of service, when once made, is conclusive; that a mistake therein cannot be corrected. The statute does not read that way, as I understand it — neither in its literal sense nor in any other.

We have so far considered the question of whether an officer's return on a garnishee summons is open to amendment as if it were wholly governed by common-law principles and the construction to be given to sec. 2756, Stats. 1898, without reference to any other section of the statutes. But, in my judgment, the right of amendment is expressly given by other sections of the statutes which my brethren have wholly failed to appreciate. Sec. 2830 provides that the court may, in furtherance of justice and upon such terms as may be just, permit an amendment of "any process or proceeding by correcting a mistake in any respect." That has been held to cover the subject of amending officers' returns, and in that respect a mere declaration of the common law. Sec. 2766 provides that a garnishee proceeding shall be deemed an action with the same right of amendment as exists in other actions. It seems to me very plain that secs. 2756 and 2766 should be read together; and when so read, that it is clear beyond reasonable controversy that it was not intended by the language of the former to conclude an officer, or party for whom he acts, by his return as first made, so that he cannot afterwards change it under any circumstances in order to remedy a mistake therein and make it conform to the truth.

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COURTEEN, Appellant, vs. KANAWHA DISPATCH and another, Respondents.

May 3 — May 21, 1901.

Railroads: Common carriers: Contracts: Destruction of goods: Limitation on liability: "Awaiting further conveyance:" "Ready for delivery to the next carrier."

1. Under the law of this state, a valid contract may be made limiting the common-law liability of a common carrier in any respect except exemption from the consequence of negligence.
2. A bill of lading provided that the consigned goods should be delivered to successive carriers; that no carrier should be liable for loss or damage after they were ready for delivery to the next carrier; and that no carrier should be liable in any other respect than as warehousemen while the goods were awaiting further conveyance. The goods were to be transported by rail and steamboat, and the railroad company transported them to a seaport with proper diligence. On arrival the goods were deposited in the railroad company's warehouse ready for shipment when the boat of the connecting carrier should arrive, it having no warehouse or dock. While the goods were awaiting shipment, they were, without negligence on defendant's part, destroyed by fire. *Held*, that the railroad company was not liable under the express stipulations of the bill of lading.
3. In such case the goods were "awaiting further conveyance" and "ready for delivery to the next carrier" within the meaning of the bill of lading.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover the value of two shipments of peas. The defendant the *Kanawha Dispatch* is a joint agency under which the other defendant and certain railroads make contracts for the carriage of freight over their connecting lines. The peas in question were shipped from Manitowoc, Wisconsin, on March 22 and March 26, 1897, under a contract with the first-named defendant, and were to be carried by rail to Newport News, Virginia, and thence by Chesapeake

& Ohio Steamship Company to Liverpool, England, for thirty-five cents per 100 pounds. The bill of lading recites that, in consideration of the rate of freight named, such service was to be performed under the following, among other conditions:

"With respect to the service until delivery at the port (A), first above mentioned, it is agreed that:

"1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by cause beyond its control, or by floods, or by fire. . . .

"2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. . . .

"3. No carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

"11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance; and, in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer."

Both shipments arrived in Newport News on April 4th, and were placed in the railroad company's warehouse on pier No. 6, to be in readiness for shipment on steamship Shenandoah, due to sail from that port at a later date. The steamship company had no dock or pier, but used pier No. 6 for its purpose. The peas remained in the warehouse until April 27th, when the warehouse and dock were destroyed by fire. By the regular course of business, goods taken to be forwarded by water were received at this pier, and remained there until the ship came, when they were taken by the railroad company's employees to the side of the vessel, and delivered to

the stevedores who did the loading. A ship had sailed the day previous to the arrival of the peas, but none had arrived up to the time of the fire, although one did arrive on the afternoon of the fire. The steamship company had three boats, but had no specified time for sailing. The peas remained in the custody of the railroad company until they were destroyed. The plaintiff did not know the peas had not been forwarded, or of the course of business at the port. The facts above stated were shown on the trial without dispute. Both parties moved for the direction of a verdict. Defendant's motion was granted, and from a judgment dismissing the action the plaintiff has appealed.

F. A. Geiger, for the appellant, to the point that defendants are not entitled to the protection of clauses 3 or 11 of the bill of lading, making them liable only as warehousemen, cited *Railroad Co. v. Manufacturing Co.* 16 Wall. 318; *Texas & P. R. Co. v. Clayton*, 84 Fed. Rep. 305, 173 U. S. 354; *Conkey v. M. & St. P. R. Co.* 31 Wis. 627; *Lewis v. C. & O. R. Co.* 35 S. E. Rep. 908; 5 Am. & Eng. Ency. of Law (2d ed.), 263; *Goold v. Chapin*, 20 N. Y. 259; *Reiss v. T. & P. R. Co.* 98 Fed. Rep. 533, 99 Fed. Rep. 1006; *McKinney v. Jewett*, 90 N. Y. 267.

For the respondents there was a brief by *Winkler, Flanders, Smith Bottum & Vilas*, and oral argument by *F. C. Winkler*.

Bardeen, J. Under the law of this state, a valid contract may be made limiting the common-law liability of a common carrier in any respect except exemption from the consequence of negligence. *Schaller v. C. & N. W. R. Co.* 97 Wis. 31; *Lamb v. C., M. & St. P. R. Co.* 101 Wis. 138; *Densmore C. Co. v. D., S. S. & A. R. Co.* 101 Wis. 563. See *Morrison v. Phillips & C. C. Co.* 44 Wis. 405. The plaintiff contends, and the defendants admit, that it was the duty of the railway company to deliver the peas to the steamship company with

all reasonable promptness and dispatch, and for failure to do so an action would lie for the damages it caused. The defendant also admits that it had charge of this property, and had not fully performed its contract; that it remained for it, upon arrival of the steamship, to make delivery of the goods. Under this concession, unless the common-law liability had been modified by the contract, the defendant would be liable for the loss by fire. In the bill of lading there was an express stipulation against such liability. That such exemption from liability was valid is abundantly supported by the authorities cited, and cleared the defendant from liability, unless it was shown that such fire occurred through defendant's negligence. No attempt was made to prove that the railway company was in any way at fault in reference to the fire. But it is said the duty to deliver to the connecting carrier is absolute, and the company cannot shield itself from liability by showing the neglect of the succeeding carrier; citing the following cases: *McLaren v. D. & M. R. Co.* 23 Wis. 138; *Blodgett v. Abbot*, 72 Wis. 516; *Peterson v. Case*, 21 Fed. Rep. 885; *Railroad Co. v. Mfg. Co.* 16 Wall. 318. The rule of those cases is salutary, and is the law of this state as applied to the circumstances therein stated. The trouble is with its application to the facts in this case. Here the carrier had discharged its full duty so far as carriage was concerned. The goods were at their ultimate place of destination by rail. The connecting carrier had no depot, or warehouse, or dock. The stipulation in the bill of lading was that the goods were to be forwarded by a specified steamship company. Unlike carriers by land, it had no specified day of departure. The goods were held by defendant to be delivered in the regular course of business, with reasonable promptness as the ships arrived. There was no possible way by which it could have discharged itself of the custody of the goods until a ship arrived. A tender to the steamship company would have been

futile, because it had no place of storage. This might be no answer for the defendant if it had not made a provision in its bill of lading to cover just such a situation. Conditions 3 and 11 seem to cover the case at all points. The first provision is: "No carrier shall be liable for loss or damage . . . after said property is ready for delivery to the next carrier." The other says: "No carrier shall be liable . . . in any other respect than as warehousemen while said property awaits further conveyance." The two provisions are of similar import, and do not exempt from loss by negligence. Adopting the language of defendant's counsel:

"To say that these goods were not there upon the pier *awaiting further conveyance* would be substituting unwarranted refinement of the plain sense of English words. Both parties to the bill of lading knew that from the necessity of the case there must be an interval between the carriage by rail and the further conveyance by boat. It would be difficult to devise language more clearly covering that interval than used in the bills of lading."

Unless these conditions are to be considered to cover the facts present in this case, we can hardly conceive a situation with reference to these two carriers where they would be applicable. The empty form of an offer to deliver, under the circumstances in proof, would not have changed the actual custody of the goods. Under the usual course of business the goods were "awaiting further conveyance." They were "ready for delivery to the next carrier," as we understand the situation, and we cannot enter into any dubious refinement to rid ourselves of this impression. The case of *Lewis v. C. & O. R. Co.* (W. Va.), 35 S. E. Rep. 908, presents a widely different situation. Two steamers of the line which was to carry the lumber destroyed left the port after the last car of lumber should have arrived, and the question whether the company had used diligence was held to be for the jury under all the evidence in the case. Another question dis-

cussed in the case was whether there was any consideration shown for any of the limitations in favor of the company. That question is not here, because the bills of lading recite that the conditions inserted are based upon the rate of freight agreed upon. Moreover, the *Schaller Case* holds distinctly that the fact that there was no consideration must be affirmatively shown by the party seeking to avoid the limitations. 97 Wis. 37. Plaintiff's counsel frankly admits that his client cannot urge want of consideration in this case. The facts which seem to have controlled the decision in *Reiss v. T. & P. R. Co.* 98 Fed. Rep. 533, differ substantially from those of the case at bar. There was no exception from liability for loss by fire; at least, none is mentioned. The only thing necessary to put the property destroyed into the possession of the steamship company was the delivery of the transfer sheets. No vessel could be designated or call for the cotton until this was done. Upon these facts the court held that it was not "awaiting further conveyance" at the time of the fire. The conditions here present are so different that it seems easy to distinguish the cases. We are satisfied that the exemptions mentioned contemplated carriage in the usual course of business by rail and by water, and covered such usual delays as are incident to transportation by those means. There was no suspension of transportation at the election of the defendant; no evidence of any negligent exposure of the goods while awaiting further transportation. On the whole case, we are convinced that the trial court arrived at a correct conclusion.

By the Court.— Judgment is affirmed.

CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, Respondent, vs. PITTELKOW and wife, imp., Appellants.

May 4 — May 21, 1901.

Mortgages: Foreclosure: Appeal: Presumptions.

1. Where in an action to foreclose a mortgage the trial court finds categorically against the defendants on the defense of duress, on appeal the finding must be taken as true when it is not antagonized by any clear preponderance of the evidence.
2. Where in an action to foreclose a mortgage the bill of exceptions does not contain the mortgage, on appeal the court will assume that the mortgage was sufficient to support a finding that a wife intended to, and did, charge her separate estate in the mortgaged premises.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

In an action to foreclose two mortgages held by the plaintiff, one of which was upon two lots in Milwaukee occupied by the defendants as their homestead, and title held under a conveyance to them "jointly as husband and wife," the defendants set up as defenses that the signature of *Mary Pittelkow* was obtained to said mortgage by fraud and duress, and that it was executed by her merely to validate it as a mortgage of *Charles Pittelkow's* interest, and not with intent to charge her separate interest therein. After trial the court found against the defendants on these issues, finding expressly that defendant *Mary* executed the note and mortgage as her free and voluntary act, that the mortgagee took no advantage of her, that no duress or undue influence was used or exercised to induce her to execute the note or mortgage, and that by the execution and delivery of the mortgage said defendant *Mary* intended to, and did, charge all of her interest and separate estate in the mortgaged premises, whereupon judgment of foreclosure and sale, without direction for deficiency judgment against either of the

defendants, was ordered and entered, from which this appeal is brought by both *Charles* and *Mary Pittelkow*.

For the appellants there was a brief by *Turner, Pease & Turner*, and oral argument by *W. J. Turner*.

For the respondent there was a brief by *Sheridan & Wollaeger*, and oral argument by *James A. Sheridan*.

DODGE, J. Upon the defense of duress, the court below has found categorically against the defendants. A careful examination of the evidence satisfies us that such finding is supported thereby,—certainly is not antagonized by any clear preponderance. That being the case, the finding must be taken as true; and discussion in detail of the evidence, which is somewhat voluminous, can serve no good purpose.

A further contention by the appellants is to the effect that the mere signature of the mortgage, as wife, by *Mary Pittelkow*, carries with it no implication of intent on her part to charge her separate interest in the land. This subject is not before us; for, if we should concede appellants' contention, it still cannot be denied that the mortgage might be in such form as clearly to evince and effectuate an intention to so charge her interest. The mortgage was introduced in evidence, and thereupon the court found that she intended to, and did, charge her separate interest in the property. Appellants have not seen fit to bring that mortgage up in the bill of exceptions, and we therefore must assume that it was sufficient to support the finding.

The findings being thus supported, the judgment as entered properly resulted therefrom.

By the Court.—Judgment affirmed.

SANDERSON and another, Respondents, vs. CREAM CITY BRICK COMPANY, Appellant.

May 4—May 21, 1901.

Voluntary payment: Storage charges: Tender of judgment: Costs.

1. Defendant contracted to deliver 400 cords of shipping wood to plaintiffs, to be transported by them by boat to Milwaukee. When the vessel was tendered to defendant for loading, fifty-seven cords of inferior wood was piled on the dock in front of the wood intended for plaintiffs, and to save double handling thereof defendant contracted with the captain of the vessel to transport such wood to defendant's dock in Milwaukee for an agreed price per cord; but the captain, in violation of his contract, delivered the inferior wood to plaintiffs, which they refused to accept, but voluntarily paid the freight to the captain. *Held*, that plaintiffs did not thereby acquire a right of action against the defendant for the amount of freight so agreed upon with the captain, and that the circumstances did not authorize them to create a legal liability against the defendant for piling or storing the wood.
2. Where plaintiffs have no right to a more favorable judgment than was offered, they can only recover costs up to the time of the offer, but must pay the defendant's costs from the time of such offer.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

For the appellant there was a brief by *Hoyt & Olwell*, and oral argument by *F. M. Hoyt.*

For the respondents the cause was submitted on the brief of *J. A. Eggen.*

CASSODAY, C. J. The complaint alleges, in effect, that during the times therein mentioned the plaintiffs were copartners in the business of buying, selling, and shipping wood and coal as proprietors of a wood and coal yard in the city of Milwaukee; that August 3, 1895, the plaintiffs, as such copartners, entered into a contract with the defendant wherein they agreed to purchase from it 400 cords of ship-

ping wood, at $2.62½ per cord, to be delivered to the plaintiffs in Mud Bay, Wisconsin, and to be accepted when the same should arrive in Milwaukee; that in pursuance of the contract the plaintiffs, December 1, 1895, had a vessel to land at that place and receive such wood, but that the defendant, in violation of the contract, furnished to the captain of the vessel, *as shipping wood*, fifty-seven cords of inferior wood, known as brick-yard wood; that as soon as the vessel arrived in Milwaukee the plaintiffs notified the defendant of the inferior quality of the wood, and that they refused to accept the same under the contract, and thereupon, and at the defendant's request, they piled and stored such inferior wood at their yard, where it remained for seventeen months, before the defendant took it away; that the storage thereof was reasonably worth $57, the piling $14.25, and the freight on the same from Mud Bay to Milwaukee $114, and damages for not delivering shipping wood instead of inferior wood $42.75.

The defendant answered to the effect that August 3, 1895, it sold to the plaintiffs 392 cords of maple wood, at $2.62½ per cord, to be delivered to them at Mud Bay, amounting in all to $1,029; that the plaintiffs promised to pay that sum for the wood on such delivery; that between August 3 and December 1, 1895, pursuant to such agreement, the defendant delivered to the plaintiffs, and the plaintiffs received from the defendant, at Mud Bay, 392 cords of wood on such contract; that the plaintiffs paid thereon $500 August 3, 1895, and $500 December 3, 1895; that the balance of the purchase price, amounting to $29, it alleges and claims as a counterclaim. The answer further alleges, in effect, that December 1, 1895, the defendant made and entered into an agreement with the plaintiffs whereby the plaintiffs undertook and agreed to transport from Mud Bay to the dock of the defendant, in Milwaukee, the fifty-seven cords of brick-yard wood mentioned, and the defendant promised and

agreed to pay for such transportation $1.62½ per cord, amounting to $92.63; that pursuant to that contract the defendant delivered such brick-yard wood to the plaintiffs at Mud Bay, who transported the same to Milwaukee, but instead of delivering the same at the dock of the defendant, as agreed, unloaded the same at the plaintiffs' yard, and notified the defendant thereof; that the defendant thereupon demanded of the plaintiffs that the wood be delivered at the dock of the defendant, pursuant to the agreement; that thereupon the plaintiffs agreed with the defendant that if it would waive the delivery of such wood at its dock the same might be stored without charge at the yard of the plaintiffs until such time as the defendant should dispose of the same; that the wood remained in the yard of the plaintiffs seventeen months, when the defendant removed the same. And the answer further denies each and every allegation of the complaint not therein specifically admitted. In and by the answer the defendant tendered judgment to the plaintiffs for the sum of $63.63, being the difference between such contract price of transportation and the $29, balance which the plaintiffs were indebted to the defendant for the shipping wood so delivered, and the costs of this action.

The plaintiffs, by way of reply, put in issue the allegations of the counterclaim.

A jury being waived, the cause was tried by the court, and at the close of the trial the court found, in effect, the contract for 400 cords of shipping wood as alleged in the complaint and admitted to the extent mentioned in the answer; that the fifty-seven cords of wood so delivered December 1, 1895, were of inferior quality, and known as brick-yard wood, and that as soon as the plaintiffs learned that the vessel chartered by them to carry shipping wood contained inferior wood they declined to accept the same, and notified the defendant thereof; that at the request of the de-

fendant the plaintiffs piled and stored such inferior wood at their yard in Milwaukee, where it remained for seventeen months; that such piling was reasonably worth $14.25; that such storage was worth $38, and such freight $92.63; that the claim made by the defendant that the plaintiffs agreed to waive all claims for damages on account of the storage was not sustained by the evidence. As conclusions of law, the court found that the plaintiffs were entitled to judgment against the defendant for the several sums mentioned, amounting in the aggregate to $144.88, less the $29 due the defendant on its counterclaim, making the balance $115.88, together with interest thereon from June 1, 1897, and costs, and ordered judgment accordingly.

From the judgment entered thereon accordingly, the defendant brings this appeal.

By the terms of the contract alleged in the complaint, the defendant was to deliver the 400 cords of shipping wood to the plaintiffs in Mud Bay, but the time within which such delivery was to be made is not alleged. The only breach of contract alleged is that the defendant "furnished to the captain of the vessel, which the plaintiffs had at Mud Bay, December 1, 1895, fifty-seven cords of inferior wood." But there is no evidence that the defendant so furnished such inferior wood to apply on the contract. On the contrary, it is undisputed that at the time of the arrival of the vessel "Jura" at Mud Bay such inferior wood was piled on the dock in front of the wood intended for the plaintiffs; that, to save double handling of such inferior wood, the captain of the Jura agreed with the defendant's agent to transport such fifty-seven cords of inferior wood to the docks of the defendant at Milwaukee for $1.62½ per cord, amounting to $92.63; that the only objection the captain made was that he thought he ought to have $2 per cord, but, as the defendant's agent was not authorized to give more than $1.62½ per cord, he would agree to transport such inferior wood to the

defendant's docks for that price, and take his chances of getting more from the defendant; and that the captain "took just enough brick-yard wood to get room to load the maple wood." The answer alleges that the contract to so transport and deliver the brick-yard wood was made by the defendant with the plaintiffs. This was manifestly upon the supposition that the vessel belonged to the plaintiffs; but it appears from their testimony that it was owned by them in common with a man in Kenosha and the captain. The captain broke his agreement to deliver the brick-yard wood at the docks of the defendant, and instead thereof delivered the same at the yards of the plaintiffs. The captain, having thus placed the brick-yard wood in the possession of the plaintiffs in violation of his contract with the defendant, was no longer in a position to exact from the defendant the payment of the freight agreed upon. The plaintiffs, having thus voluntarily paid the freight which the defendant was under no obligation to pay, did not thereby acquire a right of action against the defendant for the amount of freight so agreed upon with the captain, much less $21.37 in excess of that amount. The plaintiffs' having thus acquired possession of the defendant's wood without its consent and contrary to its agreement with the captain of the vessel furnished by the plaintiffs, and of which they were part owners, did not authorize them to create a legal liability against the defendant for piling or storing the wood. Whatever rights of action the plaintiffs may have against the defendant on account of the brick-yard wood must have been acquired by virtue of their agreement with the defendant after that wood reached Milwaukee. It appears from the clear preponderance of the evidence that the plaintiffs agreed to store the wood so belonging to the defendant free of charge, until such time as the defendant could dispose of the same. The two Drakes and the defendant's bookkeeper so testify. True, one of the plaintiffs, as a witness, denies

the making of any such agreement, but even he fails to give testimony authorizing a recovery from the defendant for such piling or storage. It appears that it cost the defendant $42.75 to move the wood from the plaintiffs' yard to the defendant's yard. Nevertheless, the defendant by its answer consented to repay to the plaintiffs the $92.63 freight which it had agreed to pay to the captain, less the $29 alleged in its counterclaim, and so tendered judgment to the plaintiffs for $63.63, being the difference between those two sums, and also costs of the action. The plaintiffs, having no right to recover a more favorable judgment than was thus tendered, only have the right to recover costs in the superior court up to the time of such tender, but must pay the defendant's costs from the time of such offer. Sec. 2789, Stats. 1898.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with direction to enter judgment as indicated in this opinion.

MUELLER, Appellant, vs. CITY OF MILWAUKEE, Respondent.

May 4 — May 21, 1901.

Municipal corporations: Negligence: Personal injuries: Streets: Ice.

1. Plaintiff, in crossing a street at a place thirty or forty feet from the prepared crossing, slipped on an accumulation of ice. The street was sufficiently lighted. The weather had been cold, and the ice had formed from a watering trough, and extended some distance from the trough. There was evidence that the ice was rough, but nothing to show that the roughness caused plaintiff's fall. The plaintiff testified simply that she slipped upon the ice. *Held*, that the testimony did not tend to show that her fall was the result of any actionable defect in the street.

[2. What would be the effect of ch. 305, Laws of 1899 (providing that no action based on the negligent accumulation of ice or snow upon a street shall be maintained unless the same shall have existed for three weeks), not decided.]

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This is an action for personal injuries suffered by the plaintiff as the result of a fall upon the street in the city of *Milwaukee.* The plaintiff appeals from a judgment of nonsuit. The evidence shows that Brady street, in *Milwaukee,* is a street running directly east and west, with a cedar-block pavement, and that on the 11th of February, 1899, at about 9:30 o'clock p. m., the plaintiff was crossing Brady street from north to south, at a place thirty or forty feet distant from the prepared street crossing, and that as she was stepping up from the roadway of the street to the sidewalk she slipped upon a large sheet of ice in the street, and fell, breaking her ankle. It appeared that the street was sufficiently lighted so that she could see where she was going; that the place of her fall was about ten feet west of a certain watering trough at the edge of the sidewalk; and that for two weeks prior to the accident the weather had been bitterly cold, and a considerable quantity of ice had formed near the trough, on the outer half of the sidewalk, and in the street extending for some distance west of the trough, and that it was on this ice that the plaintiff fell. There was some evidence tending to show that the ice was rough, but there was no evidence tending to show that the roughness caused the plaintiff's fall. The plaintiff testified simply that she fell because she slipped, and that she slipped because of the ice.

For the appellant the cause was submitted on the brief of *McElroy & Eschweiler.*

For the respondent there was a brief by *Carl Runge,* city attorney, and *Joseph B. Doe,* special assistant city attorney, and oral argument by *Mr. Doe.*

WINSLOW, J. The nonsuit in this case was plainly right. Not only was the plaintiff walking upon a part of the street

not prepared for foot passengers to walk upon, but the evidence utterly fails to show that she fell by reason of any actionable defect in the street. She testifies simply that she slipped upon the ice. This testimony does not show, or tend to show, that her fall was the result of any actionable defect. *Chamberlain v. Oshkosh*, 84 Wis. 289. A verdict that she fell by reason of a defect in the street would be based merely upon conjecture. *Hyer v. Janesville*, 101 Wis. 371.

These considerations render unnecessary any consideration of the effect upon the case of the passage of ch. 305, Laws of 1899, providing that no action based on the negligent accumulation of ice or snow upon a street shall be maintained unless the same shall have existed for three weeks.

By the Court.—Judgment affirmed.

IN RE STITTGEN.

May 24, 1901.

Habeas corpus: ***Infants: Guardianship: Custody: Circuit courts: Jurisdiction: Parent and child:*** **Res adjudicata.**

1. Where the circuit court has made an order relative to the guardianship and custody of an infant, the only question to be reviewed on an original writ of *habeas corpus* issued out of the supreme court is the jurisdiction of the circuit court in making such order.
2. In such limitation of questions reviewed the word "jurisdiction" must be understood in its fullest and most comprehensive sense: the circuit court does not sit as a mere magistrate or statutory tribunal, only *quasi*-judicial in character; its jurisdiction does not depend alone upon having the subject matter legally within the scope of its powers; nor is its jurisdiction lost by disregard of procedure according to law, but if it has acquired jurisdiction of the parties, and has authority over the subject matter, that must be the end of the inquiry.

3. The circuit courts of this state, in dealing with the subject of guardianship and custody of minors, act *judicially* as courts, with all the powers, ancient and modern, of both chancellor and the court of chancery, and may, in a proper case, override alike the natural rights of the parents, and the legal rights of those to whom guardianship has been accorded, either under police power or other statutory authority, and so direct with reference to the minor's custody as to promote its best welfare.

4. In a divorce action in the circuit court the custody of petitioner's minor daughter was awarded to her. Thereafter, on application to the county judge under sec. 4587*b*, S. & B. Ann. Stats., petitioner was adjudged an unfit person to have the custody of her daughter, who was committed to the custody of the superintendent of a society for the care of children, whence, by *habeas corpus*, petitioner again gained control of the child, the superintendent being unwilling to defend against the proceedings. Thereafter the child's uncle petitioned said circuit court for the appointment of a guardian of the person of the child, alleging that the mother was an unfit person to have its custody, which was established on a trial, and that court appointed the child's aunt guardian and ordered the mother to deliver the child to her. *Held*, that the previous proceeding did not forestall the powers of the circuit court, nor exclude it from considering and deciding that the child's welfare required her withdrawal from the control and custody of her mother and committal to that of the guardian, and such decision will not be reviewed on *habeas corpus*.

5. In such case, it affirmatively appearing that petitioner's character, life, and surroundings were unfit for contact with the child, the supreme court would, in *habeas corpus* proceedings, deny the relief asked, even were the guardian's custody of the child unsupported by any order of court or other legal right.

APPLICATION for a writ of *habeas corpus*.

Proceeding by original writ of *habeas corpus*, issued from this court upon a petition of *Frederika Stittgen*, the mother of a nine-year old girl, Lillie, asserting her detention by *Mrs. Harry Ernst*, and seeking her enlargement and delivery to the petitioner. From the return it appeared that at the suit of *Frederika Stittgen* a divorce was decreed by the circuit court for Milwaukee county on December 3, 1898, which, among other provisions, awarded to the mother (this

petitioner) the custody of certain of the children, including the daughter Lillie; that thereafter, upon application to the county judge of Milwaukee county under sec. 4587*b*, Stats. 1898, petitioner was decided to be unfit to have the custody of the two daughters, Lillie and Ella, and the former was committed to the guardianship and care of the Reverend C. Eissfeldt, as superintendent of a society for the care of children, whence, by *habeas corpus* proceedings, the child was afterwards withdrawn, by reason of the unwillingness of Mr. Eissfeldt to contend against such proceeding, and delivered to petitioner. On September 28, 1900, one John Stittgen, a brother of the father, made application to the circuit court for Milwaukee county that he or some other suitable person be appointed guardian of the person of Lillie upon the ground that the mother is an unfit person. Upon due notice, the matter of that petition was referred to Hugh Ryan, Esq., a commissioner of the circuit court, before whom an extended trial was had, in which the unfitness of the mother was made to appear in very extreme degree, and Mr. Ryan so reported. It is not necessary to defile the records of this proceeding with the particulars. By his report the commissioner also recognized the impropriety of any control over the child by the father, in deference to the decree of divorce adjudicating against his custody, and reported the unsuitability of the said uncle, John Stittgen, by reason of his close association with the father in residence and business, and reported that an aunt of the child, *Mrs. Harry Ernst*, resident at Beaver Dam, and her husband, were suitable and proper persons to have the care and custody of the child, they having expressed a willingness to accept the responsibility and to perform the duties thereof. Upon this report the circuit court on February 2, 1901, entered its order:

"That the report of the referee be, and the same is, in all respects confirmed, and that *Mrs. Harry Ernst*, Beaver Dam, Wisconsin, be, and she hereby is, appointed guardian of said

minor child, Lillie Stittgen. Further ordered that *Frederika Stittgen*, mother of said minor child, Lillie Stittgen, be, and she hereby is, required to deliver the said minor child, Lillie Stittgen, forthwith to *Mrs. Harry Ernst.*"

After certain obstructive and dilatory procedure, this order, by the aid of the sheriff, was carried out, and Lillie taken into the custody of her aunt and guardian, *Mrs. Ernst*, who produces her in court, in response to the writ of *habeas corpus*, with a return showing the foregoing facts, which, while traversed, is denied in no material particular. At the close of argument, an order was entered remanding Lillie Stittgen to the custody of *Mrs. Ernst.* A statement of the reasons for such order is deemed advisable.

W. J. Kershaw, for the petitioner.

M. H. Eaton, for the guardian. [No brief on file.]

The following opinion was filed June 20, 1901:

DODGE, J. The only question which can be reviewed upon the writ of *habeas corpus* is the jurisdiction of the circuit court making the order for the guardianship and custody of this minor. *In re Meggett*, 105 Wis. 291. In this limitation of the question, the word "jurisdiction" must be understood in its fullest and most comprehensive sense. If the circuit court had jurisdiction of the parties and authority over the subject matter, that must be the end of the inquiry; for in this respect that court sits in no sense as a mere magistrate or statutory tribunal, only *quasi*-judicial in its character, where jurisdiction depends not alone upon having the subject legally within the scope of its powers, but also upon procedure in accordance with law, and where jurisdiction is lost by disregard of legal duty, of which illustrations are found in *State ex rel. Wood Co. v. Dodge Co.* 56 Wis. 79; *State ex rel. Heller v. Lawler*, 103 Wis. 460; and *State ex rel. Durner v. Huegin*, *ante*, p. 185. The circuit court, in dealing with the subject of guardianship and custody of minors, acts as a court, and judicially, in the broadest and highest sense of

that word. It sits as the inheritor of all the judicial powers, ancient or modern, of both chancellor and the court of chancery. *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 531; *In re Klein*, 95 Wis. 246; *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 447. No question is raised but that personal jurisdiction was acquired by due and sufficient notice to all parties in interest. Nor, indeed, does counsel for the petitioner assail the proposition that the subject of guardianship is within the general scope of the equity powers of the circuit court,—a subject which may be considered at rest since the decision in *In re Klein*, *supra*, where, upon authorities cited, that power is declared to exist within boundaries so broad as to leave it almost unlimited.

The petitioner does, however, insist that in the case under consideration no jurisdiction over the subject existed, for the reason that such subject matter had already been adjudicated in another forum, and in the same forum but in another proceeding, to wit, by the county judge, under sec. 4587*b*, S. & B. Ann. Stats., and the review of his order upon the *habeas corpus* proceeding, and by the circuit court in a divorce action between the parents of this child. The latter circumstance is especially dwelt on, as excluding the jurisdiction of the circuit court upon the present application, for the reason that the custody of the child is still an open controversy, within the control, decision, and regulation of the circuit court, in the exercise of its powers of revision and modification of the judgment in the divorce action. We need not consider whether the circumstance that a subject has already been decided or is pending for decision in another court or proceeding excludes it from the jurisdiction of other courts, in a strict and technical sense, or whether, where such rule is laid down, the word "jurisdiction" is not used loosely, merely to declare the impropriety or illegality of a second court taking cognizance of the subject matter; as, for example, when it is said that

courts in equity have not jurisdiction where there is a plain and adequate remedy at law. It may be debatable whether *res adjudicata* or *pendente lite* is a fact which destroys jurisdiction, strictly, or ignoring of which merely constitutes error. We may pass that question, for very brief consideration of the scope and nature of the questions pending before the county judge on the application under sec. 4587*b*, and pending before the circuit court in the action of divorce, will make it obvious that the broad power of the court of equity to regulate guardianship and custody of minors has not been exhausted by either. That it is not so exhausted by the proceeding before the county judge is already decided (*In re Klein*, 95 Wis. 246), and, if the final order of the county judge cannot so exclude the general jurisdiction of the circuit court, of course the revision or practical reversal of that order upon *habeas corpus* cannot. Decision by another court or magistrate upon the legality or illegality of the county judge's action gives no new or added breadth to that order. Considerations similar to those suggested in *In re Klein*, *supra*, lead to a like conclusion as to the noneffect of the action of the circuit court in the divorce proceeding to exclude the equity powers of that court over the general subject of the child's custody. The three proceedings illustrate three entirely distinguishable phases of the subject of legal control over the custody of children. Underlying all is the inherent legal and natural right of the parents, and in ordinary circumstances of the father, to exercise full custody and control over the children. Except in extraordinary — nay, extreme — cases, this legal authority is so buttressed in natural law that it should remain undisturbed. The sense of parental duty and affection is so essential a part of human nature, and reliance thereon is so important to develop the reciprocal filial affection and confidence which is so necessary to the best development of character in children, if they are to be qualified for the po-

sition of moral and useful citizens thereafter, that interference with those relations and influences can seldom be wise, though in exceptional cases it becomes not only wise, but imperatively necessary. When the normal relation of the family, with the two parents co-operating in the care, nurture, and development of their children, must be broken, under the divorce laws, of course an abnormal situation is brought about; and there, in the light of all the facts and circumstances, the court which severs that relation between the parents is vested with the power to decide to which of them shall be intrusted the authority and parental duty to the child, which can no longer be exercised by both jointly. While the power of the court is not strictly limited so but that the welfare of the child is properly taken into consideration, still the decision is as to the relative rights and obligations of the two parents litigant, and such is the limit of the field of consideration and decision then before the court. This is shown by the statute regulating the matter (secs. 2362, 2363, Stats. 1898).

Distinct from this question of relative rights and duties of the parents upon the severance of the marital relation between them and disintegration of the family, there is the interest of the public that children shall not be exposed to abuse or to perverting and debauching influences, tending to their injury and disabling them to become fit members of society. The right and duty of the government to take precautions to this end is but an exercise of the police power, and in the performance of that right and duty and the exercise of that police power is sec. 4587*b*, S. & B. Ann. Stats., vesting in the county judge authority to remove the child from the custody of those who otherwise would be entitled to and charged with its custody and nurture. But there is still a third and broader aspect of the situation, and that is the right of the child to have its own welfare considered; and upon that right rests the power, now under

consideration, of the court of equity, originally the custodian of the conscience of the monarch in his paternal relation to all his subjects, to act when a case calling for such action is presented, and to override alike the natural rights of the parents, the legal rights of those to whom guardianship has been accorded, either under the police power or under other statutory authority, and to so direct with reference to the custody of the child as shall be promotive of its best welfare. The action of the court of equity is not in repudiation of the legality or the authority of either natural guardians or guardians appointed by other courts. It is but the exercise of a higher and more general duty of care for the welfare of all infants. Hochheimer, Infants, § 15; *Markwell v. Pereles*, 95 Wis. 406.

From these definitions of the purposes for which the various jurisdictions are exercised, it is obvious that none of the antecedent proceedings have forestalled or exhausted the field upon which the circuit court entered in making the order now assailed. That order is not dependent either upon the police power of the state, or upon the right of either parent as against the other, but rests upon considerations of the welfare of the child itself, is higher and more ample than either of the others, and calls for a wisdom and breadth of view equaled by few judicial functions. Nothing appears which in any respect excluded the circuit court from considering and deciding, under its power as a court of equity, that the welfare of Lillie Stittgen required her withdrawal from the control and custody of her mother, and committal to that of the respondent. We cannot, on *habeas corpus*, review that decision, but must remand the child to be held in obedience thereto.

Even were the respondent's custody of the child unsupported by any order of court or other legal right, we should reach the same conclusion. This court, as indeed most others, has consistently held that, upon *habeas corpus* proceed-

ings by a parent to enforce his legal right to the custody of his child, the court should deny the order if it clearly appears that the parent is such a person that the welfare of the child must suffer under his control. *Markwell v. Pereles, supra; In re McChesney*, 106 Wis. 315; *Lemmin v. Lorfeld*, 107 Wis. 264. True, the unfitness must very clearly appear, and in no doubtful case should the natural right of both the parent and child to parental care and custody be denied; but in the case before us the petitioner's character, life, and surroundings are so shockingly unfit for contact with a little girl that we could have no hesitancy in refusing to subject her to them.

PITTSBURG TESTING LABORATORY, LIMITED, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, imp., Respondent. 110 633 / 115 461

December 11, 1900 — June 20, 1901.

Mechanics' liens: Subcontractors: Foreclosure: Quasi-*public corporations: Electric railway and light companies: Public convenience: Property subject to lien.*

1. Under the general language of the mechanics' lien statutes, as applied to a railway or other *quasi*-public corporation, a lien may be enforced against such structures or property of the corporation as are not essential to the maintenance and operation of its road or plant for the public purposes for which it was established. *Carney v. L. C. & M. R. Co.* 15 Wis. 503, and *Purtell v. Chicago F. & B. Co.* 74 Wis. 132, criticised.
2. In an action to foreclose the lien of a subcontractor against the power house of an electric-light and street-railway company, furnishing light and power and operating a street railway for the public purposes for which it was established, it was admitted that the corporation was engaged in carrying out its purposes by means of its plant and appliances "other than the new power house" in question. *Held*, that plaintiff was entitled to such lien.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Hoyt & Olwell*, and oral argument by *F. M. Hoyt.*

For the respondent there was a brief by *Miller, Noyes & Miller*, and oral argument by *Geo. H. Noyes.*

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the complaint to enforce a subcontractor's lien upon the premises described. The complaint, after alleging that during the times therein mentioned the plaintiff was a corporation located at Pittsburg, Pennsylvania, and that the defendant the *Milwaukee Electric Railway & Light Company* was a corporation located at Milwaukee and organized to engage and engaged in the business of operating in the city of Milwaukee a system of street railways and an electric-light and power plant, and that the defendants Warren and John Roberts were copartners engaged in the business of civil engineers and contractors, alleges, in effect, that the electric company sells electric light and power produced at such plant, and has a contract with the city of Milwaukee for lighting certain streets therein, which contract was entered into December 15, 1895, and by its terms expires December 15, 1900; that the electric company is now engaged in carrying out and completing such contract by means of its plant and appliances "*other than the new power house hereinafter mentioned;*" that the electric company had, long prior to entering upon the construction of such new power house, constructed power houses in various parts of the city and placed therein proper engines, boilers, and machinery, and has ever since operated and used, and is now operating and using, the same for the purpose of producing electricity; that the last-named power houses and appliances therein contained are amply sufficient for the purpose of supplying

with electricity and operating the system of street railways and electric light and power plants of the electric company as they have been heretofore and now are constructed and carried on, and sufficient to enable it to carry out and fulfill its contract with the city until the expiration thereof; that the electric company is contemplating extensions and additions to its system of street railways and to its lighting and power plants; that to operate such systems and plants when so increased and extended as contemplated a new power house is necessary; that for the purpose of constructing such new power house the electric company, in 1898, caused plans and specifications to be prepared and made therefor by an architect of the city; that prior to February 6, 1899, Warren Roberts & Co. were employed by and entered into a contract with the electric company to perform work and labor and to furnish materials according to plans and specifications in and about the erection and construction of a brick building to be used as such new power house owned by the electric company, and situated on the land thereinafter specifically described; that in and by such contract it was provided that all the structural material used and employed in the construction of such building should be tested and inspected by this plaintiff at the expense of Warren Roberts & Co.; that prior to February 6, 1899, the plaintiff was employed as subcontractor by Warren Roberts & Co., under their contract with the electric company, to test and inspect such structural material; that as such subcontractor, under such employment, the plaintiff performed work and labor for Warren Roberts & Co. between February 6, 1899, and August 19, 1899,— that is to say, inspected and tested the structural material used and employed by Warren Roberts & Co. in the construction of such building under and pursuant to the provisions of the plans and specifications aforesaid; that the exhibits attached contain a true and correct statement of the work, tests, and inspections

thus performed by the plaintiff, showing the amount of work done and the prices therefor; that such prices were the prices agreed upon between the plaintiff and Warren Roberts & Co. for the doing of such work; that all of such work and labor was done and performed upon structural material which was sold and furnished to be used, and which was actually used, by Warren Roberts & Co., in the construction and erection of such new power house; that such new power house stands and is situated upon two lots therein described; that the electric company, at the time of making such contract with Warren Roberts & Co., was, and ever since has been, and now is, the owner of the land and of the new power-house building situated thereon; that the same does not exceed one acre in extent, and is within the limits of the city; that the last date of the performance of such labor of this plaintiff was August 19, 1899; that September 20, 1899, this plaintiff gave to the electric company the notice of its claim for a lien and statement thereof, of which true copies are thereto attached; that October 13, 1899, this plaintiff gave to the electric company the notice and statement of the work, tests, and inspections, of which true copies are thereto attached; that November 29, 1899, this plaintiff duly filed, as required by law, its claim for lien for the amount due and owing to it from Warren Roberts & Co. in the office of the clerk of the circuit court for Milwaukee county, a copy of which claim for lien is thereto attached; that such claims and all the allegations thereof are true, and are thereby made a part of this complaint; that one year has not elapsed between the doing of such work and labor and the commencement of this action; that there is now due and owing to the plaintiff from Warren Roberts & Co., by reason of such claim, $777.29, and interest thereon from August 19, 1899. Wherefore, the plaintiff demands judgment that the amount of its lien be ascertained and adjudged and enforced against such premises, with costs.

The question presented is whether the facts stated are sufficient to entitle the plaintiff to a subcontractor's lien upon the premises described, under the statutes of this state, for the work and labor performed. Secs. 1775, 1775*a*, 3314, 3315, Stats. 1898. The statutes declare, in general terms, in effect, that the party performing such work and labor shall have a lien upon such building and the interest of the owner thereof therein upon complying with the provisions of such statutes. Id. It is virtually conceded that the facts alleged would entitle the plaintiff to such lien if the premises were owned by a private party, and used for private purposes. But it is claimed, and the trial court manifestly held, that such statutes are not applicable to property of a *quasi*-public corporation engaged in operating a system of street railways and an electric-light and power plant in the city of Milwaukee. In support of such claim counsel rely upon certain decisions of this court; and counsel for the plaintiff rely upon certain other decisions of this court in support of its claim for a lien herein. We shall not here undertake to harmonize or reconcile all of such decisions; much less all that has been said in the different opinions in support of such decisions; but we will attempt to decide this case in accordance with the principles of law applicable to the facts stated.

The early case of *Hill v. L. C. & M. R. Co.* 11 Wis. 214, 221, was an action to enforce a mechanic's lien for building a part of a brick block, which, had it been completed according to the contract, would have extended "along the whole front of the block, upon the street," being 420 feet, and to the depth of fifty-five feet, and constituted the defendant's depot in Milwaukee. The "judgment was recovered by default, and was entered for a lien upon the interest of the company in the whole block 41." On the application of the company for a modification of the judgment, it was made to appear "that the railroad track was laid across the

east part of the block between the buildings and the river; that the whole block was not necessary or convenient for the use of the buildings erected, which were designed for stores and offices;" and thereupon the court modified the judgment "so as to confine the lien to the west sixty feet of the particular lots on which the building, as far as erected, actually stood." On the appeal by the plaintiff from such modified judgment, the same was reversed by this court, which held that the plaintiff was entitled to a lien upon one acre in the block; and that, as the block exceeded an acre, it was necessary for the court to determine to what portion of the block the lien extended; and so this court came to the conclusion "that the lien of the appellants was equivalent to a mortgage by the company of an acre in the block, and that it should be adjudged to cover the south one acre of the block, extending from the river to the street, and that it should be so sold as to leave what remained to the company in a compact form, extending also from the river to the street." The court reached that conclusion expressly because the premises were "at the very end of the road, and where from the very nature of the premises, it would be more convenient to both parties" that they should be so divided, in order that each party should "have access both to the river and the street." As the land was situated at the very end of the railway tracks, the lien could be thus enforced without destroying any of the corporate franchises of the company. The enforcement of the lien could at most only result in acquiring some of the property of the corporation not essential to the enjoyment of such corporate franchises. Upon that ground the decision may be sustained, although the reasoning of the opinion may not, in all respects, be approved. In fact, the learned justice who wrote the opinion, in a note to the case, states that some of such reasoning was inapplicable. The decision seems to have gone largely upon the ground of the superior equity.

Two years after that decision, a mechanic's lien in favor of a subcontractor was enforced by this court against the depot of a railroad company and a certain amount of land upon which it was situated, seemingly without reference to or consideration of the question whether the corporate franchises of the company were thereby destroyed or impaired. *Carney v. L. C. & M. R. Co.* 15 Wis. 503, 509. At the same term of the court it was held that a municipal corporation was not liable to garnishment in an attachment suit. *Burnham v. Fond du Lac*, 15 Wis. 193. That case was followed in *Buffham v. Racine*, 26 Wis. 449, and *Merrell v. Campbell*, 49 Wis. 535. Upon the principle involved in those cases, it was subsequently held by this court that the lien of a subcontractor, under the statute, did not extend to machinery furnished by him, and placed in a building constituting a part of the waterworks of a city. *Wilkinson v. Hoffman*, 61 Wis. 637. This was not put upon the ground that the general language of the statute (sec. 3314) was not broad enough to authorize such lien, but on the grounds of public policy, and because the objects of municipal government forbid that the clause of the statute referred to should be held applicable to machinery placed in a building constituting a part of the city waterworks; that it stood upon the same ground as where material is furnished for a county court house, jail, public school building, or other public building, which are held to be exempt from the operation of mechanic's lien laws; and that upon the grounds of public necessity and convenience it was held that the lien did not attach. That case has been repeatedly approved by this court. *Platteville v. Bell*, 66 Wis. 326; *Chapman V. Mfg. Co. v. Oconto W. Co.* 89 Wis. 264–271; *Strike v. Wis. O. F. M. L. Ins. Co.* 95 Wis. 586. A prominent author states that: "On the grounds of public policy, the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties, and towns for public use."

2 Jones, Liens (2d ed.), § 1375, citing many adjudications from numerous states. In support of the proposition, see *Leonard v. Brooklyn*, 71 N. Y. 498; *Parke Co. Comm'rs v. O'Connor*, 86 Ind. 531. The same rule is there stated as applying to school houses and waterworks so erected for public use. The "public policy" mentioned seems to be nothing more than an enforcement of the old common-law rule, as stated by SAVAGE, C. J., that: "When a statute is general, and any prerogative right, title, or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him." *People v. Herkimer*, 4 Cow. 348. In an earlier case in the same state, it was said that:

"In a representative government, where the people do not and cannot legally act in a body, where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally cogent. . . . On the ground of expediency and public convenience, this was necessary. As an attribute of sovereignty, it was equally important to be preserved." *People v. Gilbert*, 18 Johns. 229.

The rule thus stated by Chief Justice SAVAGE was, at an early day, expressly sanctioned by the supreme court of the United States, and they added that:

"The doctrine that the government should not, unless named, be bound by an act of limitations, is in accordance with that just cited from Bacon, because, if bound, it would be barred of a right; and in all such cases is not to be construed to be embraced unless named, or, what would be equivalent, unless the language is such as to show clearly that such was the intent of the act. . . . The real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers to whose care they are confided." *U. S. v. Knight*, 14 Pet. 315.

See, also, *Dollar S. Bank v. U. S.* 19 Wall. 239; *U. S. v. Herron*, 20 Wall. 263. As stated in one of these cases, the same principle has been decided in several of the states; and

all upon the same ground. In some of the cases it is held that the statutes of limitation do not run against the state unless expressly declared. *People v. Gilbert*, 18 Johns. 229; *Comm. v. Hutchinson*, 10 Pa. St. 466. In other cases the rule has been applied to the discharge of bankrupts or insolvents. In the administration of government the municipality is the agency of the state.

The question recurs whether the rule applicable to municipalities applies also to *quasi*-public corporations. Upon that question there seems to be a diversity of opinion. 2 Jones, Liens, §§ 1378, 1618, *et seq.* There can be no question in this state but that electric railway corporations, as well as other railway corporations, although constructed for the private emolument of those engaged in such enterprises, are highways, which have, nevertheless, been established under the authority of law, and primarily for the convenience and benefit of the public. They both have the right of eminent domain. Sec. 13, art. I, Const.; secs. 1845–1863*a*, Stats. 1898. Such being the relationship between the corporation and the public, the supreme court of the United States has held that:

"Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company that *may be essential in the operation and maintenance of its road for the public purposes* for which it was established." *Buncombe Co. Comm'rs v. Tommey*, 115 U. S. 122.

In that case Mr. Justice HARLAN, speaking for the whole court, said, in effect, that "a different construction of the statute would enable parties having liens" for small amounts "to destroy a public highway, and defeat the important objects which the state intended to subserve by its construction. No such intention should be imputed to the legislature

unless the words of the state clearly require it to be done." Page 129. Thus it has been held in Pennsylvania that "the results to be produced to the public by public corporations" for building bridges, turnpikes, railroads, and the like "cannot be disturbed by the seizure by creditors of any part of the property *essential to their active operations.*" *Foster v. Fowler*, 60 Pa. St. 27. Debts against such corporations must be recovered in the ordinary way, so as to allow them to progress with their undertaking, and accommodate the public. *Id.* Such rules were applied in that case to a corporation for introducing water into a town for the accommodation of its inhabitants. *Id.* The principle involved in that case was approved in a later case in the same court, "where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation." *Girard Point S. Co. v. Southwark F. Co.* 105 Pa. St. 248. And, also, see *Guest v. Merion W. Co.* 142 Pa. St. 610, 615; *Reynolds v. Reynolds L. Co.* 169 Pa. St. 626. On the other hand, it has been held in the same state that:

"Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes are bound by the lien of judgments against the corporation, and are liable to be levied in execution, and sold by the sheriff, as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation." *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337.

And yet in the same case, WOODWARD, J., speaking for the court, said:

"Though the corporation, in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation." Page 339.

See, also, *Oakland R. Co. v. Keenan*, 56 Pa. St. 203. The rule of construction mentioned, and some of the adjudications cited in support of it, have repeatedly been sanctioned or recognized by this court. *Yellow River Imp. Co. v. Wood Co.* 81 Wis. 560, 562; *S. C.* 17 L. R. A. 92, and note; *Fond du Lac W. Co. v. Fond du Lac*, 82 Wis. 322, 329; *Chapman Valve Mfg. Co. v. Oconto W. Co.* 89 Wis. 264; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506; *State ex rel. Milwaukee St. R. Co. v. Anderson*, 90 Wis. 550; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29; *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80, 89; *State ex rel. Badger I. Co. v. Anderson*, 97 Wis. 114. In a recent case Mr. Justice MARSHALL said:

"Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation." *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 446.

The rule to be deduced from the best-considered cases seems to be that a railway is an entirety, and that under the general language of a statute no lien attaches to a particular section or part of the road essential to its operation and maintenance for public purposes; but that, under the general language of such statutes, a lien may be enforced against such structures and property of the corporation as are not essential to the operation and maintenance of the railway for the public purposes for which it was established. In addition to the authorities cited, see *National F. & P. Works v. Oconto W. Co.* 52 Fed. Rep. 43; *S. C.* 68 Fed. Rep. 1006; 2 Jones, Liens (2d ed.), §§ 1618, 1619; 3 Elliott, R. R. §§ 1066–1075. In one of these sections Mr. Elliott says:

"The courts will not presume that the legislature intended to subject the public to the annoyances and inconveniences

which would necessarily attend the enforcement of a mechanic's lien against a railroad under a general mechanic's lien law, and will not so construe it, unless such an interpretation is clearly required." Id. § 1066.

The distinction between the cases where liens cannot be enforced against a particular structure or section of a railway, essential in its operation and maintenance for the public purposes for which it was established, and the cases where the lien may be enforced against a particular structure belonging to such corporation, but not so essential to its operation and maintenance, and hence which may be taken from the corporation without destroying or impairing its corporate franchises, has not always been observed in this court. The question is not whether the legislature may, in its wisdom, authorize the enforcement of such lien in any case, but whether the general language of our statute shall be so construed as to authorize a *pro tanto* destruction of the corporate functions created as an entirety, and primarily for the benefit of the public. In other words, courts are not authorized, in the construction of such general language, to repeal *pro tanto* the charter of a corporation so created primarily for the public benefit, especially in violation of a well established rule of construction of such general statutes so far as public rights are concerned. Such rule was not observed in *Carney v. L. C. & M. R. Co.* 15 Wis. 503, and the more recent case of *Purtell v. Chicago F. & B. Co.* 74 Wis. 132. In the case at bar it is admitted that the defendant was engaged in carrying out and completing its contract with the city by means of its plant and appliances "*other than the new power house*" in question. In other words, it is admitted that the new power house, against which the lien is sought to be enforced, was not essential to the operation and maintenance of the defendant's system of street railways, and an electric-light and power plant for the public purposes for which the defendant corporation was established. It follows

from what has been said that the plaintiff is entitled to such lien.

By the Court.—The order of the circuit court is reversed, and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law.

BARDEEN, J., took no part.

KREIDER, by guardian *ad litem*, Appellant, vs. THE WISCONSIN RIVER PAPER & PULP COMPANY, Respondent.

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January 12—June 20, 1901.

Master and servant: Personal injuries: Negligence: Evidence: Defective machinery: Witnesses: Adverse party: "General managing agent" of corporation: Trial: Unguarded machinery: Assumption of risk: Fellow-servants.

1. In an action to recover damages for an injury caused by negligence, it is not error to exclude evidence tending to prove that after the employee was injured the defects in the machinery were repaired.
2. In such action it is not error to sustain objections to questions asked the manager of the defendant's mill, as to whether he had ever heard, prior to the injury in question, of any one else being hurt by the appliance in question.
3. Where there is other undisputed evidence on the same subject it is not error to exclude testimony by defendant's manager, who was not a practical machine man, as to his knowledge of the use, purpose, and necessity of a certain improved form of appliance.
4. Neither is the exclusion of such testimony error, when there is no evidence that other employers in similar businesses and in the exercise of ordinary care and prudence were in the habit of using such improved appliances.
5. An employer is not guilty of negligence merely because he does not adopt the best or most approved way and machinery. It is sufficient if, in the exercise of ordinary care and prudence, he adopts the ordinary way and machinery in use by other employers, in similar businesses.

6. A witness whose deposition as an adverse party was attempted to be taken under sec. 4096, Stats. 1898, testified that he was not an officer or stockholder of defendant corporation; that he was local manager of its mill at a certain place; that the money used in that mill went through his hands; that he paid employees, looked after outside business, bought material, and conducted the correspondence relating to the mill, but that he had nothing to do with the mechanical running of the mill nor the hiring of help, and that he worked under the direction of the defendant's president, who made weekly visits to the mill. *Held*, that the witness was not the "general managing agent" of defendant, within the meaning of said sec. 4096, nor of sec. 4068, which permits the "general managing agent" of any corporation which is a party, or for whose benefit the action or proceeding is prosecuted or defended, to be examined on the trial "as if under cross-examination, at the instance of the adverse party."

[7. Whether an exception to the ruling against the reading of such deposition is available to obviate any error in excluding certain parts thereof, not decided.]

8. In an action for personal injuries received while employed in defendant's mill it is not error to exclude testimony as to the proper lighting facilities of such mill, where it appeared that the plaintiff commenced working at six o'clock in the evening of July 15, and there was nothing in the complaint or plaintiff's testimony indicating that any want of light contributed to the injury, or that the injury occurred at night, or that it was dark at the time.

9. When the plaintiff in an action for personal injuries has testified fully as to the circumstances of the accident, and other witnesses have been examined, and counsel has discussed the question of the injury, and the court, in making a ruling, has commented thereon, it is not error to refuse to allow plaintiff, on being recalled, to go over his testimony again, that being a matter within the discretion of the court.

10. Under sec. 1636*j*, Stats. 1898, providing that all shafting, so located as to be dangerous to employees in the discharge of their duties, shall be securely guarded or fenced, the question whether an employer is negligent in failing to guard a set-screw on a paper winder projecting nine sixteenths of an inch above the surface is for the jury.

11. Plaintiff, nineteen years of age, with some experience as a factory workman, and four and one-half days' experience in defendant's paper mill, was injured while assisting to operate a paper winder. On being told to hold the box of the machine down while the paper was being wound, he pressed down with his hands, and, that being

insufficient, put his whole weight against the box by leaning over it, his chest resting on his elbows, in which condition his clothing was caught by a set-screw projecting nine sixteenths of an inch from a shaft which was revolving toward him at a great rate of speed, and he was injured. There was evidence that the nature of the work had been explained to him by the foreman, and that the plaintiff had noticed that the shaft was not moving smoothly. *Held*, that the plaintiff assumed the risk and could not recover. WINSLOW, J., dissents.

12. The fact that the plaintiff was told to hold the box down by a co-employee does not affect the employer's responsibility, the latter not being responsible for any alleged misconduct of a fellow-servant in that respect.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Brown & Pradt*, attorneys, and *Barber & Beglinger*, of counsel, and oral argument by *Fred. Beglinger*.

For the respondent there was a brief by *C. H. Van Alstine*, and oral argument by *Chas. M. Morris*.

CASSODAY, C. J. This is an action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant, July 15, 1896, and at work upon a paper winder, being a machine which wound the finished paper as fast as it was manufactured upon spools or bobbins, and consisted of two upright standards or supports about forty inches in height, securely fastened to the floor opposite each other, and about ten feet apart. Upon the upper end of each such standards there was a shaft box or socket about two and one-half inches wide and four inches long, each box being in two pieces, with semicylindrical grooves, and a shaft about two and one-fourth inches in diameter running from one standard to the other, about forty inches from the floor, the ends of which rested in the lower halves of the boxes or sockets, and the upper halves of such boxes

rested on the lower halves and the journals of the shaft, the upper halves being hinged at one end to the lower halves and held in place at the other end by dogs or catch buttons. After loosening the dogs or catch buttons, the upper halves could be raised, so as to allow the shaft to be lifted out of the lower halves of the boxes. Each end of the shaft projected outward some from the standards, and had various collars at the end of the shaft to keep it from lateral motion. The collar at the end of the shaft on the right-hand of the attendant (the plaintiff at the time of the injury) was about three fourths of an inch thick, and close up to the boxes, and movable, and held in place and kept tight by means of a set-screw with a square head, being a small steel bolt with threads upon it passing through the collar and against the shaft, which projected nine sixteenths of an inch above the surface of the collar. The set-screw was a few inches distant from the standards, and was used to release or loosen the collar from the shaft by turning it with a wrench. The shaft, when winding paper, had on it a spool of wood or iron, on which the paper was wound, and revolved at various rates of speed,— from 106 to 475 revolutions per minute,— the speed being decreased as the spool filled. The end of the shaft at the attendant's right hand extended about one foot beyond the box. The shaft was operated by means of belts and pulleys connecting it with the other machinery of the mill. The negligence alleged is to the effect that the shaft was not properly and securely fastened and held in place at the bearing points, so as to revolve smoothly and evenly at all times, but would run irregularly and unevenly, and at times shake and jump; that the shaft gearing and set-screw were uncovered, and not safeguarded or fenced in, and the set-screw was not countersunk; that the plaintiff was ignorant of the presence of the set-screw and its projection, and the dangerous character of the shaft and its bearings, and

the defendant negligently failed to inform him of such dangerous machine, but ordered and directed him to work and attend the paper on the spool of such revolving shaft; that while so working, and while the shaft was in motion, the plaintiff's clothing was caught by the shaft and set-screw, and he was thrown with great force and violence around the end of the shaft and against the floor and the standard, and badly injured. The defendant answered by way of admissions, denials, and counter allegations, and, among other things, to the effect that the shaft and set-screw were so located and used as to make it impracticable to guard or fence the same. Upon the trial, and at the close of the testimony on the part of the plaintiff, the court granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

It is undisputed that the manner of using the winder was to the effect that four men were employed on the machine of which the winder was a part, the machine tender and three others; that one of the men arranged the paper so that it would properly wind around the spool; that the shaft was then set in motion, and was kept in motion until the spool was full; that, when the spool was full, the winder was stopped, and the upper halves of the boxes were raised and thrown back, and the shaft lifted out and rolled on the paper roll down a plank to the floor; that the set-screw was loosened before or after the shaft was lifted out of the boxes, and the collar was removed, so that the shaft might be pulled out of the spool; that the shaft was then pulled out of the spool, and another spool was placed thereon, and it was put into the boxes again, and the collar and set-screw were adjusted, and the paper winder was again ready for its work; that it took a little less than one hour to fill a spool.

1. We perceive no error in excluding testimony tending to prove that some time after the injury the defendant

caused the set-screw to be countersunk. This court has repeatedly held that evidence tending to prove that defects in machinery or a highway have been repaired after an injury is inadmissible in an action to recover damages for such injury. *Lang v. Sanger*, 76 Wis. 71, 75; *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 202; *Phillips v. Willow*, 70 Wis. 6; *Richards v. Oshkosh*, 81 Wis. 226; *Barrett v. Hammond*, 87 Wis. 654. The first, third, fourth, and fifth errors assigned come within the principles stated, and, for the reasons given, are overruled.

2. Error is assigned because the court sustained an objection to a question put to William T. Whiting — a witness on the part of the plaintiff, and the defendant's local manager of the mill in question — as to whether he had ever heard, prior to the injury, "of any one else being hurt on this set-screw." This court has repeatedly held that evidence tending to prove the fact of such prior injury was inadmissible. *Phillips v. Willow, supra; Richards v. Oshkosh, supra; Barrett v. Hammond, supra.* Certainly, it was more objectionable to prove that he had heard some one say that some one else had been hurt on the set-screw. Of course, the plaintiff was at liberty to prove, if he could, by legitimate evidence, that the set-screw was dangerous; and that the defendant had notice of it prior to the injury in question. For these reasons, the eighth error assigned must be overruled.

3. After the same witness had testified that he did not claim to be a practical machine man, and was not a practical machine man, he was asked by the plaintiff's counsel these questions: "Did you ever see countersunk set-screws? . . . What was the object of countersinking?" The objections to such questions were sustained, and we perceive no error in such rulings. It is admitted in the answer that the set-screw in question "was not countersunk." The plaintiff's witness Barnes, "a practical machinist," was allowed to tes-

tify that "the countersinking of a set-screw is one that is let into the collar so that the outer circumference of it is smooth, nothing projecting over it, so that the set-screw does not project over the collar;" that "it is done with a drill with a center in it," and costs seventy-five cents; and that the object of it was to prevent anything coming in contact with it from being caught. Such evidence is undisputed. There is no evidence in this case that other employers of ordinary care and caution, engaged in similar business, were in the habit of countersinking such set-screws. The defendant is not to be held guilty of negligence merely because it did not adopt the best or most approved way. It was sufficient for the defendant to adopt the ordinary way and machinery in use by other employers in similar business in the exercise of ordinary care and prudence. *Innes v. Milwaukee*, 96 Wis. 170, 174, and cases there cited.

4. Most of the errors thus assigned arose upon the testimony taken on the examination by the plaintiff of William T. Whiting, at Stevens Point, nearly two years before the trial, as an adverse witness, under sec. 4096, Stats. 1898, amended by ch. 29, Laws of 1899. That section provides that "the examination of the president, secretary or other principal officer or general managing agent" of a private corporation, when a party to an action, may "be taken by deposition at the instance of the adverse party in any action or proceeding, at any time after the commencement thereof and before judgment." To the reading of the deposition taken upon such examination the defendant objected on the ground that the witness, Mr. Whiting, was then in court, and that there was nothing to show that he was one of the persons mentioned in the statute authorizing the examination of parties as an adverse witness. The objection was overruled, and the defendant excepted. The witness William T. Whiting in such deposition testified to the effect that he was not an officer or stockholder of the

defendant corporation; that he was the general manager of the company,—that is to say, he was the local manager of the mill, and had the local management at that place, but had nothing to do beyond that; that the officers of the company were George A. Whiting, president, R. C. Russell, vice-president, C. A. Babcock, secretary and treasurer; that Babcock and Whiting lived at Neenah, and Russell at Oshkosh. After completing the reading to the jury of the deposition of William T. Whiting so taken, the plaintiff called him for further examination, and he testified to the effect that he had heard his deposition, so taken, read to the jury; that he was the same person who gave that deposition; that he was the manager of the mill,—the local manager,—and was in July, 1896; that he was not the general managing agent of the defendant; that the money that was used in the mill went through his hands, buying supplies, paying off men, and looking after the outside business, buying pulp, looking after houses and real estate belonging to the company; that he conducted the correspondence relating to the mill; that he did not have anything to do with the direct running of the mill,—the mechanical running of the mill,—and never had; that he was not the paper maker; that Mr. Partington was hired for that purpose, and that he hired the help and discharged them; that George A. Whiting, president of the company, lived at Neenah, the home of the company, and had the management of the mill at Stevens Point, over him; that whatever orders he gave as to the machinery and stock, and what should be manufactured, was done under his direction, and his orders were obeyed; that George A. Whiting was there every week, and gave his instructions, and he and Partington carried them out. The defendant objected to further examination of the witness by the plaintiff's counsel on the ground that, as the witness was not the president, secretary, or any principal officer, or general managing agent of the defendant, he was not

subject to such examination upon the trial, "as if under cross-examination," at the instance of the plaintiff, as "the adverse party," as prescribed in sec. 4068, Stats. 1898. The court sustained the objection, and the plaintiff excepted. The court then granted the plaintiff's request to further examine the witness as to his qualifications; and he did, but elicited no more favorable testimony. The court again sustained the objection to the competency of the witness under sec. 4068, Id., but did not rule that he was not competent as a witness generally. The plaintiff excepted, and asserted that he did not wish to call him as a general witness. We are constrained to hold that such objections were properly sustained. The witness was called by the plaintiff, and he had no right to examine him "as if under cross-examination." He was not the "general managing agent" of the defendant, within the meaning of sec. 4068 nor sec. 4096. Each of those sections "refer to an agent having a general supervision over the affairs of the corporation." *Upper Miss. Transp. Co. v. Whittaker*, 16 Wis. 220; *Carr v. Commercial Bank*, 19 Wis. 272; *Wheeler & W. Mfg. Co. v. Lawson*, 57 Wis. 404. It follows from what has been said that the reading of the deposition of William T. Whiting, under the circumstances stated, was improper, and the objection to the same should have been sustained; and, possibly, the exception to such ruling might be available to obviate any supposed error in excluding certain parts of that deposition, but it is unnecessary to determine the question in this action.

5. In the deposition of William T. Whiting, so taken, he was asked these questions by the plaintiff's counsel: "How was your mill lighted?" "How was it as to the number of lights you had?" Error is assigned because the objection to each of those questions was sustained. There is nothing in the complaint nor in the plaintiff's testimony indicating that any want of light contributed to the injury. It is not even alleged that the injury occurred in the night, and we

find no evidence that it occurred in the night, nor that it was dark at the time. The plaintiff testified that his time for commencing work was six o'clock in the evening. That was long before dark on July 15, 1896, when the injury occurred. We find no error in sustaining the objection to such questions.

6. Error is assigned because, after the plaintiff had testified fully as to the manner in which his clothes were caught and he was injured, and after a large number of other witnesses had been sworn and examined, and after counsel had discussed the question, and the court, in making a ruling, had commented upon the fact, counsel recalled the plaintiff, who testified that he had overalls on at the time of the injury which came way up to his chest, close to his neck, about four inches from his neck, fastened up with buttons; and that he had heard the witness who had just testified. He was then asked by his counsel whether the set-screw on the collar caught in his overalls, and also whether he felt his overalls being torn in any place from the moment he was caught; and error is assigned because the court sustained an objection to each of such questions. The trial court certainly had some discretion as to allowing the plaintiff to go over his testimony again under the circumstances stated. We perceive no error in sustaining such objections.

7. Error is assigned because the court granted a nonsuit and dismissed the action. It is contended that the admitted fact that the set-screw projected nine sixteenths of an inch above the surface of the collar constituted actionable negligence. Counsel for the plaintiff cite two cases which have some bearing upon the question. In the Missouri case cited the shaft was twelve feet long, six inches in diameter, and about ten inches above the floor, and covered, except for a space of about three feet at the end nearest the turntable. The collar at that end of the shaft was about an inch and a half thick, and the set-screw projected above it about two

inches, and the shaft revolved 250 revolutions per minute. On the first trial a nonsuit was granted, but the judgment thereon was reversed by the appellate court on the ground that the danger was partly hidden. *Dowling v. Gerard B. Allen & Co.* 6 Mo. App. 195. That judgment was affirmed by the supreme court. 74 Mo. 13. The next trial resulted in a verdict for the plaintiff; and the judgment thereon was reversed, for error, by the supreme court. 88 Mo. 293. Upon a retrial the plaintiff recovered a verdict and judgment, and the same was affirmed by the supreme court on the ground that the plaintiff was an inexperienced youth of seventeen years of age, and was ignorant of the danger, and had received no warning. In the Vermont case cited [*Geno v. Fall Mountain P. Co.* 68 Vt. 571] the plaintiff was sixteen years of age. On the night of the accident he was instructed by the foreman to oil the countershaft, which propelled the machinery and was fastened to the ceiling eight or ten feet above the floor. In attempting to do so he walked up over the screens, and reached his hand to the bearings; and, while attempting to oil the countershaft, the sleeve of his frock was caught upon a set-screw, not countersunk, but projecting three fourths of an inch above the surface of the collar, and he was seriously injured. The court sanctioned a charge to the jury that:

"If the defendant, in the use of this set-screw in the place where it was used, was in the exercise of the care and prudence that prudent men are accustomed to exercise in like circumstances, then the defendant is not liable on account of negligence in using this set-screw in that place, and for the purposes it did use it. The employer is not bound to use the newest and best appliances for his employees, but he performs his duty when he furnishes those of ordinary character and reasonably safe, and the former is the test of the latter." *Geno v. Fall Mountain P. Co.* 68 Vt. 571.

The particular fact which the court appears to have emphasized was whether the use of the set-screw "in the place

where it was set was reasonably safe in view of the fact that the plaintiff was required to oil the bearings upon the countershaft, and was liable to come in contact with the head of the set-screw." Pages 576, 577. The defendant cites a Massachusetts case where the plaintiff, a boy sixteen years of age, worked in a room where was a horizontal shaft twelve feet long and about one foot above the floor, resting on bearings at each end, to which power was communicated by a belt from an upper shaft. To prevent longitudinal vibration of the lower shaft, an iron collar was fastened to one end of it by a set-screw, the end of which projected half an inch above the surface of the collar. And the court "held that there was no evidence that there was a breach of any duty on the part of the defendant which he owed to the plaintiff. *Held*, also, that the defendant was not bound to box the shaft, and that the fact that the collar could be secured to the shaft without a projecting screw or nut was not evidence from which the jury would be warranted in finding that the defendant was not justified in using the device." *Hale v. Cheney*, 159 Mass. 269. In a later case in the same state it was held that:

"If the proprietor of a factory has in use a projecting set-screw for holding the collar on a shaft upon which is a pulley, although there is a safer kind of set-screw in common use, he owes no duty to a person entering his employ to box the pulley or shaft, or to change the set-screw for a safer one." *Rooney v. Sewall & D. C. Co.* 161 Mass. 153.

The case at bar differs in some respects from any of the cases cited. In this state we have a statute which declares that "all belting, shafting, gearing, hoists, fly wheels, elevators, and drums" in every place where persons are employed to perform labor, "so located as to be dangerous to employees in the discharge of their duty, shall be securely guarded or fenced" by the owner or manager thereof. Sec. 1636*j*, Stats. 1898. That statute has frequently received consideration from this court. *Thompson v. Johnston Bros.*

Co. 86 Wis. 582; *Thompson v. Edward P. Allis Co.* 89 Wis. 528; *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 485; *Powalske v. Cream City Brick Co., ante*, p. 461. Most of these cases leave it to the jury to say whether the unguarded shafting or gearing was so located as to be dangerous. Of course, where there is no room for conflicting inferences, it is for the court. We cannot hold, as a matter of law, that the defendant was not guilty of negligence by reason of such projecting set-screw being unguarded.

8. But the cases just cited, and others which might be cited, also hold that such statutes do not give a right of recovery in any case where the plaintiff has assumed the risk, or been guilty of contributory negligence. *Helmke v. Thilmany*, 107 Wis. 222, and cases there cited. At the time of the injury the plaintiff lacked one month and twelve days of being nineteen years of age. He had, prior to the accident, worked for two or three months in a sash, door, and blind factory in Wausau, piling up stiles and moldings. He next worked, prior to the accident, for five or six months in feeding excelsior machines in a mill in Wausau. He fed eight such machines in a row, each machine being driven by steam power, and having sharp knives and scissors which cut the wood into excelsior. He next worked in the Stevens Point mill in question. After he had worked there on the machine in question for four days and a half, he was injured. The plaintiff testified to the effect that, in pursuance of his talk with the foreman in the morning, he went with his dinner pail to begin work at six o'clock in the evening; that the foreman then told him that the men at the machine would tell him what to do, and to obey them; that they and the foreman showed him what to do,— to oil up the boxes on this paper machine every half hour; that they also showed him that he was to clean out the screens, and also oil other boxes every half hour; also to take paper

out while the machines were in motion, and clean out under the machine; that a part of his employment was to bring spools, and place them ready for use near the machines; that the spools were put on the shaft, and fastened there, so as to revolve with the shaft; that there might be fifty spools there every night; that when the spool was full the machine was stopped; that the shaft then, with the roll of paper upon it, was taken from the upright down onto the trucks or floor by means of wooden blocks and a lever; that three or four were engaged at such work,— two at each end; that they all helped take out the shaft; that he had an iron rod, which he twice before held against the center of the paper while the machine was in motion and the shaft revolving; that such was the character of the work he did while there; that just before he was hurt he had that iron rod in his hand, and was holding down the center of the paper; that the second hand told him to stop doing that, and hold the box on his right hand down; that he then went and pressed down with one hand on the shaft; that he went up to the box on the outside of the standard; that he then pressed down with both hands on it; that that not being enough, he put his whole weight on the box by leaning over it, his chest resting on his elbows, pressing down on the box, but that the box did not touch his body at all; that the shaft was revolving towards him at the time; that the first thing he knew he was "caught in the blouse of" his "overalls," and the paper was coming over the top of the shaft, and winding; that the first thing he knew he "was whirling around the shaft;" that he tried to tear himself loose, but could not do it; that he felt it tear his flesh, but did not know what happened after that; that the center line of his chest was about five inches from the end of the shaft when he was hurt, and that the end of the shaft projected about a foot beyond the standard; that at the time he was hurt

his body was on the right side of the collar of the box — of the box; that before he was injured he noticed that the shaft was bobbing up and down; that he had not noticed it before while he worked there; that the paper had been running on the spool about ten minutes before he was hurt, and the shaft was running at a high rate of speed. Such is the plaintiff's account of the accident. Since the set-screw was loosened every time a spool was filled, and since it took less than an hour to fill a spool, and since the plaintiff had worked at the business for four days and a half before he was injured, it is idle to claim that he did not know of the existence of the set-screw, and that it projected above the surface of the collar. Since the collar was close up to the box on the top of the standard, and the end of the shaft extended about a foot beyond the standard, it is difficult to tell, from the plaintiff's version, whether his clothes were caught by the end of the shaft or by the set-screw. But the view we have taken of the case makes it immaterial.

"This court has repeatedly held that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger." *Helmke v. Thilmany*, 107 Wis. 224, and cases there cited. "It has also been repeatedly held that, where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as, under the circumstances, ought to have been known and comprehended by the plaintiff, then he will be held to have assumed the risk as a matter of law. *Id.* Such appears to be the case at bar, and hence the trial court correctly held that the plaintiff assumed the risk." *Id.*, and cases there cited. *Williams v. J. G. Wagner Co.*, *ante*, p. 456.

It is no excuse that the plaintiff was told to hold down the box or shaft by his fellow-servant. The defendant was not responsible to the plaintiff for such alleged misconduct

of his fellow-servant. *Prybilski v. N. W. C. R. Co.* 98 Wis. 413; *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 581.

By the Court.— The judgment of the circuit court is affirmed.

WINSLOW, J. I respectfully dissent in this case, because I do not think it can be said, as matter of law, that the appellant assumed the risk.

HERMAN, Respondent, vs. THE CITY OF OCONTO, Appellant.

110	660
112	[11]360
112	[11]364
110	660
115	[8]633

February 1 — June 20, 1901.

Municipal corporations: Sewer contracts: Pleadings: Evidence: Bribery: Constitutional law: Limitation on indebtedness: Assets: Liabilities: Tax levies: "Current expenses:" "Outstanding obligations:" Contracts: Severance: Scaling down.

1. In an action to recover under a sewer contract the answer alleged that the contract was secured by means of fraud, bribery, and corruption. On a former appeal this allegation was held sufficiently definite to permit the introduction of evidence on such issue. The work was completed by the plaintiff, surety for the original contractor, after the latter had abandoned it, and the city received and retained the sewers, which cost considerable more than the contract price. The evidence showed that a lawyer, employed by the original contractor, bought refreshments for the members of the board of public works, and was active in assisting the contractor to secure the contract, but there was no evidence as to when the city discovered the alleged bribery, nor was plaintiff's good faith challenged. The evidence also showed that but two bids were received, that of plaintiff's principal being slightly the higher; that before awarding the contract the board satisfied themselves that the other bidder was not a desirable person; and that, acting on such information, the contract was awarded to plaintiff's principal as the lowest responsible bidder. The court submitted to the jury a special question, in substance, whether at or about the time the sewer contract was let the contractor or his agent paid any money to any member of the board of public works for the purpose of

corruptly influencing official action, which the jury answered in the negative. *Held*, that the evidence did not sustain the charge of bribery; that the verdict was within the allegations of the answer; and that the circumstances disclosed by the evidence were not so flagrant that the court should have gone beyond the direct issues made by the pleadings in submitting the case to the jury.

2. A city borrowed $35.000 from the state with which to erect a high-school building, and at the time of letting a contract for the construction of a sewer about $21,000 thereof was in the treasury, and the building was in process of erection. There was no proof that any contract had been let for the school building or as to its probable cost. *Held*, that the unexpended balance should not be considered as an asset in determining whether the obligations under said sewer contract were in excess of the constitutional limit of indebtedness, the presumption being that it was needed and to be used for the purpose for which it was borrowed.

3. Where a contract for the construction of sewers was made in October, taxes which had been apportioned by the secretary of state under sec. 1070, Stats. 1898, to pay amounts due the state January 1st, following, but which could not go into the tax collector's hands for collection until December, cannot be considered "in process of immediate collection" so as to make them assets of a city in determining whether the constitutional limit of indebtedness had been exceeded.

4. Where the exact amount of indebtedness under the contract in such a case cannot be ascertained from the record, it will be assumed, in determining whether the city's indebtedness, including such contract, exceeded the constitutional limit, that the actual amount of indebtedness on such contract is the amount admitted by the city to have been earned by the contractor, independent of any deduction therefrom of damages allowed the city for failure to complete the contract within the time limited therefor.

5. Contracts whereby a city had agreed to pay certain sums annually for its water supply for thirty years; certain sums monthly for electric lights for three years; and certain sums monthly for teachers' wages,—upon which nothing was due when a contract for the construction of a sewer was entered into,—cannot be included as liabilities in determining whether, by the sewer contract, the city had exceeded the constitutional limit of indebtedness. *Stedman v. Berlin*, 97 Wis. 505, approved.

6. Interest on outstanding bonds of a city payable in annual instalments in the future is not a present indebtedness within the meaning of such limitation.

7. Debts for the ordinary running expenses of a city, and debts within the power of a city to contract, payable within a year out of the incoming revenues actually levied or in good faith intended to be levied, are not such as are comprehended within the last clause of sec. 8, art. XI, Const., requiring any city, before or at the time of incurring any indebtedness, to provide for the collection of a direct annual tax sufficient to pay the interest as it falls due, and the principal within twenty years. If, however, the debt is made to mature at such time as would make it a charge upon the future resources of the city beyond one year, then the levy of such tax is necessary to its validity.
8. Where the city charter gave the common council power to build sewers and pay the expense out of the general fund, a sewer contract, bearing no interest, payable within one year,— the city, at the time of entering into such contract, having no funds on hand with which to pay the contract price,— is not void under said sec. 8, art. XI, Const., because no provision was made at the time it was executed for the collection of a direct tax.
9. The building of a sewer is not "a current expense" within the meaning of sec. 2, subch. V, ch. 56, Laws of 1882 (authorizing the city to annually levy a tax not exceeding one half of one per cent. to defray current expenses, and a like amount for all other purposes except payment of any outstanding obligations, etc.), but the contract being such as the city had power to make and provide for its payment out of the general fund, the debt incurred therefor is an "outstanding obligation" within the meaning of such exception. [Whether said provisions of the charter are such a limitation on the power to contract as would render a contract in excess thereof void, not decided.]
10. Under said charter (sec. 17, subch. VI, ch. 56, Laws of 1882), authorizing the common council to levy taxes for the several purposes mentioned "but not exceeding the authorized percentage," the percentage limit only applies to such items as are mentioned in sec. 2, subch. V.
11. A city received and retained a sewer system costing nearly $20,000, and had paid no part of the cost. It was absolutely valueless to the contractor, and unless the amount earned under the contract exceeded the constitutional debt limit, the city was bound to pay therefor. The contract was in a sense entire, but it divided the sewers into several districts. The contractor was to build the sewer at so much per foot, depending on the size of material used in the different streets, and he was to put in manholes and catch-basins at agreed prices; and the lumber used was to be paid for at

a certain rate per thousand feet. It was impossible to tell from the written contract itself how much the actual contract price was. The plans, from which a division of the contract could be made, were made a part of the contract, but were not brought up with the record. *Held*, that the transaction was of such a nature that the contract might be severed and held valid up to the limit within which the city was authorized, under the constitution, to contract, and that, defendant having failed to furnish the proper data on which to apportion the invalid part, it should be scaled down to the limit within which the city had the power to contract, and held valid within that limit.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Modified and affirmed.*

The facts in this case are quite fully stated on the former appeal (100 Wis. 391), where it was held that the complaint stated a good cause of action, and that the answer was sufficiently definite to permit the introduction of evidence in relation to the issue of fraud, bribery, and corruption therein presented. A second trial was had. By stipulation the complaint was amended to the effect that, after the contract in suit was made, the plaintiff agreed with Turner to make advances for carrying on the work; that, after the work had been partially done, Turner's interest was sold to plaintiff, and notice given defendant; that plaintiff was induced to make advances and to complete the work on the faith that the contract had been fairly let; and that he had no knowledge of any claim that it had been obtained by any improper means. The answer was also amended, setting up a contract between the city and the Oconto Water Company for a water supply, continuing for thirty years from July 9, 1890, at an annual rental of $6,500 for one hundred hydrants, and $50 a year for additional hydrants. It also alleged that on January 1, 1894, the city borrowed from the state $35,000, payable, with interest, in twenty years, at the rate of $1,750, and at the time the contract was made, Octo-

ber 22, 1894, there was interest accrued thereon, and payable January 1st thereafter, amounting to $1,750. It also alleged other indebtedness of the city as follows:

Electric light company	$4,014 50
City-hall and engine-house bonds	3,000 00
Current expense and city orders	10,000 00
Other state, county, etc., indebtedness	5,000 00

—making the total indebtedness of the city over $65,000, which was in excess of the five per cent. limit. The place of trial was changed to Sheboygan county. At the trial a further amendment was made to the answer, to the effect that at the time the said contract was made no tax levy was made to discharge the indebtedness thereby created, as required by sec. 3, art. XI, of the constitution; that the city was without funds; and that the city had no power under its charter to incur such indebtedness. It was agreed that the only issue that should be submitted to the jury was the one that arose upon the allegations of the answer relative to Turner's securing the contract by improper means,—the other issues to be determined by the court. Pursuant to this arrangement, the jury rendered the following special verdict:

"*Q.* 1. At or about the time when the sewer contract in suit in this action was entered into by the city of *Oconto* with William Turner, did the said Turner and one Paul J. Foley, or either of them, pay or cause to be paid any money to any member or members of the board of public works of said city for the purpose and with the intent thereby to bribe such member or members, and to corruptly influence their official action in letting or awarding, or in reporting to the city council in favor of the letting or awarding, of such contract to said Turner? *A.* No."

The court rendered a lengthy written decision, and made findings showing the city's assets and liabilities at the date of the contract as follows:

"School loan from state	$35,000 00
City-hall and engine-house bonds and interest	3,030 00
City orders outstanding	4,009 00

Officers' salaries, for fire department, support of poor, etc...		609 32
Electric light.....		628 35
E. L. Shaw, $75 and $133.33.....		208 33
Sewer contract sued on.....		17,323 01
Total.....		$60,808 01
From which should be deducted:		
County order on hand.....	$667 00	
Cash in contingent fund.....	94	
		667 94
Balance of indebtedness.....		$60,140 07

Constitutional debt limit, $60,687.75."

As regards the first item mentioned, the court found that said sum was borrowed from the state on April 6, 1894, and that it was payable in twenty annual instalments, of $1,750, with five per cent. interest in addition, on January 1st of each year; that the city received said sum on May 31, 1894, less the advance interest up to January 1, 1895, and that it was borrowed for the purpose of building a high-school building; that on October 31, 1894, there was yet in the high-school building fund $21,433.34; and that the building was then in the course of erection. No proof was offered and no finding made as to any contract relative to the erection of the high-school building, or of its probable cost.

As regards the city-hall and engine-house bonds, the court found there were outstanding bonds amounting to $3,000, of which $2,000 became due, with six per cent. interest, August 18, 1895, and $1,000 and interest August 1, 1896. The interest had been paid to August 1, 1894. In his computation of indebtedness, the court included interest earned, but not due, on the bonds, to the date of the contract, amounting to $30.

The evidence showed total outstanding city orders, $4,100. The court disallowed orders amounting to $91, as being void, having been issued for an unauthorized purpose.

The court found that in August, 1893, the city made a contract with the electric-light company to light the city for three years at a stated price per light, payable at the end of each month. The sum above mentioned is the amount of the bills for lighting for October and November, 1894.

As regards the Shaw indebtedness, it appears that the city owed him $75 for services. Early in October the city entered into a contract with him to superintend the construction of the sewer to be built, and was to pay him for the time so engaged at the rate of $1,600 per year, at the end of each month. He began work November 1st, and the $133.33 above mentioned is for his services for November.

Under the contract in suit, the total amount of the work, at the price agreed upon, was $18,099.66. At the close of the work the next year there had been some delay, and under the terms of the contract the city made a deduction at the time of settlement of $776.65 as liquidated damages. The court found the amount of the indebtedness created by the contract of October 22d to be the difference between these two sums.

At the time the contract was entered into, the city was under contract, by ordinance, with the Oconto Water Company, for a water supply, running thirty years from July 9, 1890, at an annual hydrant rental of $6,900, payable January 1st and July 1st of each year. All instalments had been paid up to July 1, 1894. The ordinance provided that payments should be met by a direct annual tax. The court found that the city was not then indebted under said contract.

It further appears in the case that the city was under contract with divers teachers of its public schools for a period of ten months, beginning September 1, 1894, the monthly pay roll therefor being $920. All wages had been paid up to the time the sewer contract was entered into, and there was over $1,600 yet left in the school fund. The court found no indebtedness under this contract.

The value of the taxable property of the city, upon which

the computation of the limit of indebtedness must be based, was found to be $1,213,755. At the time the sewer contract was entered into, no provision for the collection of a direct annual tax to pay the liability thereby created was made.

Upon the findings so made, the court directed judgment for plaintiff. Both parties filed numerous exceptions. A motion by defendant for judgment, and, if denied, for a new trial, was denied, and from the judgment entered on the verdict and findings the defendant has taken this appeal.

For the appellant there were briefs signed by *P. H. Martin*, of counsel, and oral argument by *P. H. Lynch* and *D. G. Classon*.

For the respondent there was a brief by *Hoyt & Olwell*, attorneys, and *H. O. Fairchild*, of counsel, and oral argument by *F. M. Hoyt*.

BARDEEN, J. We desire to enter our earnest protest against the printed case in this action. It is inexcusably long. It is padded with matter entirely foreign and unnecessary to an understanding of the questions presented for decision. The judge's charge, findings, and exceptions are printed twice. Nearly thirty pages of exhibits to the complaint are printed in full; numerous bonds, orders, stipulations, and proceedings on the former trial are set out at length, and yet no question is raised as to any of them. Five pages are taken up with the cost bill and affidavit of attendance of witnesses, neither of which is questioned. In fact, the printed case seems to be a copy of the record, duplicated in some particulars. It was entirely unnecessary, and constitutes a flagrant violation of Rule VIII. We acquit the learned counsel who argued this case for appellant of any part in its preparation, and trust that the guilty one will never repeat his offense.

Many troublesome and interesting questions have been

presented and ably argued. We have given them our fullest consideration, and the result has been reached only after careful study and investigation. The conclusion reached renders it unnecessary to consider several of the most interesting questions raised.

The defendant's first contention is based upon the claim that the contract sued upon is void, as having been secured through bribery and corruption of some of the public officers charged with the duty of letting the contract. Let us first ascertain the issue presented by the answer on this question. It charges "that the contract was secured . . by means of fraud, bribery, and corruption, in payment to certain of the members of the board of public works, . . . whose names are to defendant unknown, large sums of money, intended to corrupt and influence, . . . and which did corrupt, influence, and control, the acts and conduct of the said members in letting and executing said contract." Upon the issue thus presented, the court submitted to the jury the question set forth in the statement. No one can doubt but that the finding is as broad as the allegation. It was adverse to the defendant. This does not satisfy defendant's counsel. They insist that the issue should have been broadened to meet certain phases of defendant's evidence, which it is claimed warrants it. In the first place, it should be kept in mind that the controversy here is not between the original parties to the contract. The plaintiff came in as surety, took up the contract, and expended large sums for its completion. No proof is offered as to when the alleged bribery was discovered by the city. The city has received and retained its system of sewers, which cost considerably more than the contract price. The good faith of the plaintiff in the matter is not challenged, so that there is no superior equity in favor of the city on the face of the situation. The circumstances are not such as to show that defendant was entitled to any great latitude under its plead-

ing, especially since its paucity of allegation was criticised on the former appeal. Under its charter, the defendant was to let the contract to the lowest reasonable, responsible bidder. The two lowest bids, differing but slightly in amount, were put in by Forrestal and Turner, the former's being the lowest. Before attempting to award the contract, the board had an investigation of the standing of the two bidders made by the city engineer. He reported that Forrestal was not a desirable person to contract with, and that Turner was considered an honest man and a good workman. It is nowhere suggested that the engineer was influenced or corrupted by the illicit funds in circulation. Acting upon this information, the board rejected the Forrestal bid. Turner was left the lowest bidder, and he was reported worthy. He was awarded the contract. The complaint is that a certain lawyer retained in his interest used improper means to secure such award,—not that he paid out any money, as alleged, to influence official actions, but that he bought some of the members refreshments and was distinctly active in securing such award. The testimony offered does not sustain the charge in the answer, and the circumstances are not so flagrant that we can say the court ought to have gone beyond the direct issue made by the pleading. The record shows that this branch of the case was fairly presented, the verdict is within the allegations of the answer, and we perceive no reason for disturbing the jury's finding.

An important question, under the allegations and proof, was whether the alleged contract increased the city's indebtedness beyond the constitutional limit of five per cent. The court found that it did not, and this finding has been attacked with great vigor. To cover all of the questions raised would prolong this opinion to interminable length. We shall notice only those of chiefest importance, and which are deemed decisive of the case.

First as to the question of fact: The city's limit of indebt-

edness was $60,687.75. The main item of the city's indebtedness was a loan from the state of $35,000, obtained for the erection of a high-school building. The money was received by the city in May, 1894; and at the time the sewer contract was made, the court finds the city had $21,433.34 of this fund still in its treasury, and that the building was in course of erection. No proof was offered that any contract had been let for the building of the school house, or as to its probable cost. The plaintiff insists that, in absence of such proof, the court must consider the sum on hand an asset, and deduct it from the city's indebtedness. It would have been more satisfactory if some definite proof as to the cost of the school building, or of the contract in relation thereto, had been produced. But the money was borrowed for a specific purpose. Under the law, it could not be used for any other purpose without the consent of the commissioners. The building was in the course of erection when the contract in suit was made. Under these circumstances, the inference is warranted that the city continued the building to completion. Municipalities are not given to borrowing more money than they need. The money having been borrowed for a specific purpose, the presumption is that it was needed and used for that purpose; and we cannot assume there will be a surplus, in absence of proof, or that it has been diverted to other uses.

The argument of plaintiff that the annual apportionment of taxes made by the secretary of state under sec. 1070, Stats. 1898, to pay the instalment due the state January 1st following, made the taxes so levied "in process of immediate collection," so as to make them assets, cannot be sustained. It was not a levy upon the property of the municipality. It was not until December 4th that the various levies were in such form as that they could be collected and enforced from the property liable thereto. At that time the proper tax roll was put in the collector's hands, and the tax was

then enforceable, regardless of the will of the taxpayer. Not until that time arrived could the amounts so levied be considered assets. *Rice v. Milwaukee*, 100 Wis. 516–521.

The contract in suit was not for a definite sum. It bound the contractor to build sewers on certain streets, according to the plans, at certain prices per foot for different sized pipes, and at varying prices for other materials, manholes, etc. The contractor was also to do extra work as directed by the engineer, on the basis of fifteen per cent. advance of actual cost. The city reserved the right to vary, diminish, or extend the work. On July 24, 1895, the plaintiff and the city officers got together and made a settlement. They found that there was due for the work done $18,099.66. From this sum the city deducted $776.65, as damages sustained by the city for failure to complete the contract within the time limited thereby, leaving a balance due plaintiff of $17,323.01. The trial court held that this difference was the amount the city agreed to pay under the contract, and was the amount that should be taken into consideration in ascertaining the city's indebtedness at the date of the contract. With this conclusion we cannot agree. The damages allowed were not in contemplation when the contract was made. It is true, the parties stipulated that damages should be paid in case of delay, but that sum was wholly unascertained and unascertainable at that time. It might be nothing, or it might have greatly exceeded the sum subsequently agreed upon. The real question is: What sum did the city bind itself to pay in case the contract was carried out and the sewers were built? No data are furnished by the contract itself from which the exact amount could be computed. That being so, we are bound to assume that the actual amount of the city's debt on the contract was the amount settled upon as having been earned by the contractor or his assignee, and not the difference between that amount and the damages allowed the city. *Culbertson v.*

Fulton, 127 Ill. 30–36. Upon this basis, it will be observed that the city's total indebtedness at the date of the contract, inclusive of the sum earned thereon, and less available assets, was $60,916.72, or $228.97 more than the constitutional limit. Stating the situation in another way, the city might contract for the construction of sewers to an amount not exceeding $17,870.69 without exceeding the limit. Its contract exceeded that sum by the amount stated, and, unless the situation is such that it may be scaled down within the limit, the contract was void. That question will be discussed further along in this opinion.

Another important question in this connection is raised by defendant. It appears that in 1890 the city contracted by ordinance with the Oconto Water Company for a water supply for a period of thirty years, and that the annual rental at the date of the sewer contract was $6,900, payable on the 1st days of January and July of each year. Also in August, 1893, it made a contract for three years with the electric-light company for city lighting at certain prices per light, payable at the end of each month. Nothing was due upon either contract at the time the sewer contract was made. As to the first contract, the court held there was no indebtedness under it. Under the second contract, the court allowed the October and November light bills as debts on October 22, 1894, on the ground that there was no money in the treasury at the time they became due. The defendant challenges the court's conclusions, and claims that the indebtedness for hydrant rental and electric light for the entire period the contracts were to run should be considered, in computing the city's indebtedness. It is also claimed that the wages of teachers for the entire period covered by their contracts should be considered in like manner. The question seems to be deemed an open one in this state, notwithstanding *Stedman v. Berlin*, 97 Wis. 505, and many pages of the brief are taken up with a discussion of the principle and the au-

thorities. We deem the *Stedman Case* decisive against defendant. The point was directly involved, and was disposed of by the following language, in answering a claim similar to the one here made:

"It is entirely well settled that this claim is unfounded in law. Where a municipality contracts for annual services for a series of years, to be paid for by annual payments, such contract does not come within such prohibition. In such case the whole amount which may ultimately become due does not constitute a debt, within the meaning of the constitution. To that end, regard is to be had only to the amount that may become due within a certain year or other period. 1 Dillon, Mun. Corp. § 136*a*, and cases cited."

This is substantially the holding of the courts in a number of states with a constitutional or statutory limitation similar to our own, as may be noted in the following cases: *Valparaiso v. Gardner*, 97 Ind. 1; *Laporte v. Gamewell F. A. T. Co.* 146 Ind. 466; *Grant v. Davenport*, 36 Iowa, 396; *Creston W. Co. v. Creston*, 101 Iowa, 687; *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1; *Smith v. Dedham*, 144 Mass. 177; *Ludington W. S. Co. v. Ludington*, 119 Mich. 480; *East St. Louis v. East St. Louis G. L. & C. Co.* 98 Ill. 415; *McBean v. Fresno*, 112 Cal. 159; *Saleno v. Neosho*, 127 Mo. 627. It is true there are a number of cases in other states in conflict with this view; but, however debatable the ground, we see no good reason for receding from the position taken in the *Stedman Case*, and hereby affirm and declare that to be the law of this state.

Another claim made is that, in ascertaining the city's indebtedness, interest should be computed on the state loan and outstanding bonds for the entire period they are to run, and added to the principal. This is upon the theory that, when interest is expressly reserved in a contract, it becomes a part of the debt. See Perley, Interest, 5; *Redfield v. Ystalyfera I. Co.* 110 U. S. 174. But is it a debt before it is earned? If so, then the most of the cases in the books

relating to the ascertainment of municipal indebtedness have been wrongly decided. In *Crogster v. Bayfield Co.* 99 Wis. 1, the limit was $257,440. The bonds issued amounted to $240,000, running twenty years, at five per cent. interest. A glance at the case of *Rice v. Milwaukee*, 100 Wis. 516, reveals the fact that, if this theory were to be adopted, the city of Milwaukee would have been indebted many hundred thousand dollars beyond the debt limit. Turn to almost any case in the books, and on this basis the limit had been passed. Such a construction of the law would avoid the greater part of the indebtedness of the municipalities of this state. Interest is not a debt, within the meaning of the constitution, until it is earned and becomes due. When the money was borrowed the city became indebted for the principal sum stated, and agreed to become indebted each year in the future to a sum equal to the interest thereon. Any other construction would lead to most startling results. Many business men and corporations could be forced to the wall if the interest they had agreed to pay on loans made was to be considered a present indebtedness. Men who had reported their financial standing to obtain credit could be called to account for not having taken into consideration their interest obligations which were to become due at some time in the future. There would be no end to the complications that might arise, and not the least would be the overturning of municipal obligations already incurred. The only case which in any way supports the theory in question is *Coulson v. Portland*, Deady, 481, which denied the right of the defendant city to issue interest coupons to railway bonds payable half-yearly through a period of twenty years. We decline to follow it. Interest rests upon much the same grounds as contracts for light and water. There may exist an obligation to pay, but, under the constitution, the indebtedness as to interest comes into existence each year as the obligation matures. It cannot be said to be a

present indebtedness, under any reasonable construction of the constitution. See *Dively v. Cedar Falls*, 27 Iowa, 227.

Another question of difficulty and importance arises upon the contention that the contract is void because at the time it was entered into no provision was made by the city for the collection of a direct annual tax to pay it, as required by sec. 3, art. XI, of the constitution. The original charter of the city gave the council power to build sewers and pay the expense out of the general fund. The city attempted to adopt some of the provisions of the general charter law which would enable it to charge a portion of the expense to adjacent lot owners. The contract in suit was entered into upon the supposition that such authority existed, and provided that, at the city's option, payment might be made in city orders, special assessment certificates, or improvement bonds. The work was to be completed before February 25, 1895, and the last payment was to be made at the expiration of six months from the final estimate. Upon the former appeal it was determined that the attempt to adopt the general charter provisions had failed. On the one side, it is insisted that the city was bound to pay as its charter provided,— out of the general fund. On the other, the claim is that it was the duty of the city, before or at the time of the incurring of said indebtedness, to provide for the collection of a tax to pay the same, and, failing so to do, the contract is void. This involves a construction of the constitutional provision before referred to, which is not entirely free from difficulty. It must be observed that section 3 is a restriction on the power of the cities, not a grant of power. It should be reasonably construed, and so as not to lead to absurd results. It should receive a sufficiently liberal construction to carry out its evident purpose, and at the same time be construed with such a reasonable degree of strictness as not to cripple municipalities in the exercise of their usual

functions. No stretch of construction should be indulged in, to reach cases not reasonably within its terms. It is not a question of inconvenience or hardship, on the one hand, or harsh and technical outreaching, on the other. We are powerless to add to or alter its provisions, and ought not to attempt to evade its clear and imperative commands. The effort must always be to construe it in view of the mischief aimed at, and in such a reasonable way as to prevent unnecessary hardships or absurd or irrational results. So much of said provision as is important in this litigation is as follows:

"No . . . city . . . shall be allowed to become indebted in any manner or for any purpose to any amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein. . . . Any . . . city . . . incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

These provisions were added to the original section by amendment in 1874. The mischief to be prevented was the creation of excessive debts for local improvements, public works, or the loaning of municipal credit, so payable that the burden should not fall upon those who contracted the obligations, or on their revenues, but on posterity. To do this effectually, it was found necessary to fix a limit on all indebtedness. This was to check the prodigality of municipal officers. The further to prevent them casting the burden upon posterity, they were required to pay the interest annually, and the principal within twenty years, and to make timely provision for the imposition of an annual tax for that purpose. There can be no doubt but that the provision is imperative and mandatory as to a debt coming clearly within its purview. We need not consider whether

a failure to do so would render the debt void, or whether it was a mere provision for the protection of the creditor, and might be waived by him, as contended by plaintiff's counsel and held by the trial court. We will consider only whether it was ever intended to be applicable to such a contract as the one in suit. It bore no interest. It was payable within a year. It possessed none of the mischievous attributes against which the amendment was directed. Waiving for the time being the question of charter limitations, it stood upon no different ground than any debt the city might create for a municipal purpose, without money in the treasury. It is conceded that the city had no funds on hand with which to pay the contract price. In such case, according to the defendant's contention, the city is powerless to incur any debt. It cannot even purchase a bottle of ink or a postage stamp unless it provides for its payment by voting a tax. It is said that the words "incurring any indebtedness as aforesaid" refer, by necessary relation, to any indebtedness "for any purpose to any amount," mentioned in the preceding sentence, and thus prevent the incurring any debt of any kind without raising a tax to meet it. The argument is plausible, but it leaves out of sight not only the mischief sought to be prevented,— the burdening of posterity by a debt,— but also fails to give any significance to the idea embodied in the latter clause that the tax is to pay interest and the principal within twenty years. These words are significant, and serve to identify and give essence and character to the indebtedness had in mind by the framers of the amendment. They indicate with certainty that the indebtedness against which a tax must be levied is one bearing interest, the time of payment of which has been extended over a series of years, and more than one year. A contrary view would lead to the palpable absurdity of requiring the city, if temporarily out of funds, to levy a tax for every item of debt it created, whether payable out of current revenues or

not. Such a construction is not necessary to carry out the purpose of the provision, and we cannot assent to its adoption.

Our conclusion is that debts for the ordinary running expenses of a city, and debts within the power of the city to contract, payable within a year out of the incoming revenues, actually levied or in good faith intended to be levied, are not such as are comprehended within the last clause of the constitutional provision quoted. If, however, the debt is made to mature at such a time as would make it a charge upon the future resources of the city beyond the period stated, then the levy of the tax is necessary to its validity.

Finally, the defendant claims the contract is void because the city had no power under its charter to levy a tax to pay for the sewer. This is based upon sec. 2, subch. V, ch. 56, Laws 1882, which provides:

"The common council of said city shall annually levy upon the taxable property of the city to defray the current expenses of said city, a tax not exceeding one half of one per cent., and for all other purposes, except for schools, bridges and the payment of principal and interest of any outstanding debts or obligations of said city a tax not exceeding one half of one per cent. upon all the taxable property of said city."

The view we have taken of the question renders it unnecessary to discuss or decide whether the limitation on the power to raise taxes is such a limitation on the power to contract, as would render a contract void that was in excess of the limit to raise taxes for any one year. See *Howard v. Oshkosh*, 33 Wis. 312; *Stedman v. Berlin*, 97 Wis. 505, 510, 511.

It cannot be said with any show of right that the building of a sewer system is a current expense. While it is not easy to accurately define what may be included under that head, still it is plain that it must be limited to such as are necessary to carry on the city government,— such as are usual and ordinary from year to year. The second limitation excepts

outstanding debts and obligations. The sewer contract was within the power of the city to make, and to pay out of the general fund. It was an outstanding obligation, and came within the exception stated. Sec. 17 of subch. VI of the charter, which says that the council shall levy taxes for the several purposes mentioned, "but not exceeding the authorized percentage, particulary specifying the purposes for which the same are levied," only makes the percentage limit apply to such items as are mentioned in sec. 2. Any other construction would make the two provisions repugnant to each other, and lead to manifest absurdity.

We now come to the question of whether the contract is such a one as may be scaled down within the constitutional limit. The cases upon this subject are not entirely harmonious. The rule is that stated in 15 Am. & Eng. Ency. of Law, 1136: "Generally only that part of the indebtedness incurred which exceeds the constitutional limit will be held void."

In *McPherson v. Foster*, 43 Iowa, 48, the defendants contracted to build a school house, and to receive bonds of the district to the amount of $15,000. By reason of prior existing indebtedness, the district could only contract an indebtedness amounting to $2,057.50. The bonds all bore the same date, and were issued, though at different times, as a part of one transaction. The court held that each bond was void to a sum proportional to the excess, and valid as to the remainder.

In *Stockdale v. School Dist. No. 2*, 47 Mich. 226, Judge COOLEY wrote the opinion sustaining bonds issued by the district up to the limit, following the *McPherson Case.*

Culbertson v. Fulton, 127 Ill. 30, was a case in which the defendant contracted for waterworks. The contract exceeded the limit a little more than $1,100. It was held that the contract to the extent of such excess was void, and valid as to the remainder. The same court quotes from the *Mc-*

Pherson Case, in *City of Chicago v. McDonald*, 176 Ill. 404–414, and concludes that the view of the law taken by the Iowa court was "the correct one, and certainly reasonable and just."

The supreme court of Indiana discusses a similar question in *School Town of Winamac v. Hess*, 151 Ind. 229, and arrives at the same conclusion. In *Catron v. La Fayette Co.* 106 Mo. 659, the court said that when bonds were issued at different times, under an act limiting the total amount to be issued, the fact that bonds were afterwards issued beyond the limit did not invalidate such bonds as were issued before the limit was exceeded.

In *Francis v. Howard Co.* 50 Fed. Rep. 44, the defendant had authority to issue its bonds to the amount of about $15,000. It issued bonds aggregating $35,000, and delivered them at one time. The court held that bonds to the extent of its power to issue became a valid indebtedness against the county. Bonds in excess of the limit were invalid and uncollectible. The rule adopted in the Iowa case was applied, and each bond was scaled down proportionally. The supreme court of Texas adopted the same rule, saying:

"If all of the bonds under the first ordinance were delivered at the same time, so that none of them have priority over the others, the amount of valid debt should be distributed equally between said bonds." *Citizens' Bank v. Terrell*, 78 Tex. 450.

Another case often cited is *Daviess Co. v. Dickinson*, 117 U. S. 657. Bonds to aid a railroad company to the amount of $250,000 were authorized, payable in blocks, in five, ten, fifteen, and twenty years. Bonds were issued in each class in excess of the right to issue, and delivered at different times. Each class had distinct letters, and were numbered in series. The overissue was declared void, and, in determining which were valid and which invalid, the court said that the test was, "Which were first delivered?" The bonds first delivered, up to the amount authorized, without regard

to classification, were valid. Those in excess of such authority were void.

In *Hedges v. Dixon Co.* 150 U. S. 182, the question involved was whether parties holding a greater part of a series of bonds issued in excess of the limit fixed by a state constitution could proceed in equity to ascertain the amount of such excess, and have each bond scaled down to the limit thus ascertained. Stress was laid on the fact that the bonds in question were issued as a donation to a railroad company, and, the holders not having paid any consideration to the county, no equity was raised against it for the amount represented by the bonds, or any part thereof. The court said:

"What the county authorized and carried into execution in the present case, both by the vote and by the donation, was one entire transaction; and, if it should be so reformed as to curtail the entire issue of bonds to such an amount as was within the constitutional limits of the county to donate, it would be something different from that which was voted by the county, and carried into effect by the issue of the bonds. This would involve the making of a different donation from that which the county voted and intended to make to the railroad company."

A further proposition decided was that the contract as to the bonds being void at law, for want of power to make it, a court of equity had no jurisdiction to enforce such contract, or to so modify as to make it legal, and then enforce it, in absence of fraud, accident, or mistake.

In *Lake Co. Comm'rs v. Standley*, 24 Colo. 1, the principle stated in the foregoing case was recognized, and held not applicable to funding bonds issued in exchange for valid county warrants, although the entire series of bonds was in excess of the constitutional limit.

The only case in this court where this question has been considered is *Crogster v. Bayfield Co.* 99 Wis. 1. The action was by a taxpayer to set aside an issue of bonds by the county in aid of a railroad amounting to $240,000. The

proposition submitted to and accepted by the county was for the construction of the road in six distinct sections, and the bonds were apportioned to and delivered as each section was completed. The entire issue of bonds exceeded the constitutional limit by something over $15,000. The bonds to be issued for the completion of the last section of the road amounted to $25,000. On the ground that the proposition was, in a degree, severable and apportionable, this court held that the issue of bonds upon the completion of the first five sections of the road was valid, and for the last section invalid. It will be observed that a number of the cases referred to hold the bonds or contract attacked valid up to the limit to which the municipality might legally go, without reference to the question whether the transaction was divisible or not. The others proceeded upon the principle that, where the transaction or contract is divisible or separable, it is valid up to the limit; otherwise, not.

The plaintiff urgently insists that the contract in suit is of such a nature that the court may properly hold it valid to the extent to which the city was at liberty to contract. So far as considerations of equity are concerned, the city has not a foot to stand upon. It has received and retains a sewer system costing nearly $20,000. It has paid no part of the cost. It would be absolutely valueless to the contractor. Except that the amount earned on the contract exceeded the debt limit, it was bound absolutely to pay for what it received. The city had authority to contract for the sewer, within a few dollars of the price stipulated. It has received all the benefits of the contract, and should pay the price, unless some legal stumbling block is in the way. We have already adverted to the terms of the contract. In a sense, the transaction was entire. There was an engagement on the one side to perform, and on the other to pay. In this view, the engagement in the *Crogster Case* was entire. But here the contractor agrees to build a certain num-

ber of feet of sewer of a given size of pipe on one street, a certain number on another, and more on other streets, of varying sizes. He is to receive a stipulated price per foot for each size of pipe on the different streets set out in detail in the contract. He is to put in manholes and catchbasins at agreed prices. He is to use lumber and be paid at a certain rate per thousand feet. His work is under the control of the board of public works, who have power to vary, diminish, or alter the work. It is impossible to tell from the written contract itself how much the actual contract price would amount to. It is only by computing the length of streets in connection with the plans that an approximate idea of the total cost can be arrived at. The plans were made a part of the contract, but they do not seem to have been brought into the record. The contract divides the sewer into several districts, the last one mentioned covering but three streets. Under these circumstances, we are of the opinion that the transaction is of such a nature as that it may be severed and held valid up to the limit to which the city was authorized to contract. Its divisibility depends upon the separable character of the work to be done. If the plans had been brought into the record, so that we could have some data to work upon, we might say the work done in the last district mentioned in the contract was outside of the limit. The failure to give us tne proper information leaves us but one course to pursue: The recovery will be scaled down to the limit the city had power to contract for, and held valid within that limit. The excess is invalid.

By the Court.—The judgment appealed from is modified by deducting therefrom the sum of $228.97, and, so modified, is affirmed. No costs will be allowed to either party, except that respondent shall pay the clerk's fees.

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Where a complaint states a plain cause of action at law, and was so treated by the parties on the trial, it will be so considered on appeal. *Boutin v. Etsell,* 276

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APPEAL.

Jurisdiction of appeal: Record.

1. Where the judgment appealed from is not included in the record, nor returned to the supreme court from the court below, the appellate court has no jurisdiction and the appeal must be dismissed. *State ex rel. Giroux v. Lien,* 369

Who may appeal: "Party aggrieved."

2. Where a judgment of the county court admitting a will to probate was reversed by the circuit court after the executor had qualified and entered upon the duties of his trust, the executor, in his official capacity, is aggrieved thereby, and is entitled to prosecute an appeal to vindicate and protect his trust. *In re Butler's Will,* 70

3. Upon the review in this court of a case upon appeal or writ of error, a proper party to such appeal or writ is entitled to be heard by counsel regardless of whether that will, for the time being, recognize him as having a status which is one of the very matters to be decided on such review. *State ex rel. Durner v. Huegin,* 189

4. If, in a *habeas corpus* suit against a sheriff, he is required to restore his prisoner to liberty, he is a party aggrieved within the rule that only such a party is entitled to be heard on appeal or review on writ of error. *Ibid.*

5. A necessary party to a judicial proceeding as a representative of public authority, having no interest in the litigation except to vindicate such authority, is a party in interest and may be a party aggrieved within the meaning of the appeal statute and the practice on review on writs of error. *Ibid.*

From what an appeal may be taken: Orders. See HIGHWAYS, 3.

6. An order denying a motion to set aside an attempted service of a summons is not appealable. *Heinemann v. Pier,* 185

7. Under subd. 1, sec. 3069, Stats. 1898, an order denying a motion for judgment on a special verdict does not prevent "a judgment from which an appeal might be taken," and is not appealable. *Mills v. Conley,* 525

Notice of appeal: Service: Record.

8. The record must affirmatively show service of the notice of appeal to the supreme court on the respondent or his attorneys and the clerk of the proper court, or the court will decline to assume jurisdiction and dismiss the appeal. *Koch v. Hustis,* 62

9. A notice of appeal was indorsed in typewritten words "Services admitted, May ——, 1900." Underneath the names of respondent's attorneys had been written, and the words, "Plaintiff's Attorneys" and "Clerk of Said Court," typewritten. Through all of such words and figures a pen had been drawn, and over all the filing stamp of the clerk of the county court had been placed. *Held,* that the supreme court could not presume, in the absence of any date, that the erasures were made after service, or that service was in fact made. *Ibid.*

10. While the fact that a notice of appeal was filed with the clerk, and had been returned by him with the record, may raise a presumption of service upon him, it does not aid a failure of proof of service on respondent or his attorneys. *Ibid.*

Return on appeal: Identification of papers. See APPEAL, 1, 10, 11.

11. Although sec. 3050, Stats. 1898, requires that on an appeal from an order, the clerk shall transmit the order appealed from and "the original papers used by each party on the application therefor," an appeal will not be dismissed where the order appealed from names the papers upon which it is based, and those papers are all returned by the clerk, notwithstanding the certificate of the clerk is defective in failing to certify that the papers attached are the papers which are required by such statute to be returned. *Glassbrenner v. Groulik,* 402

Record: Bill of exceptions. See APPEAL, 13, 15. NEGLIGENCE, 4.

Record: Presumptions. See ACTION. CONSTITUTIONAL LAW, 6. NEGLIGENCE, 4.

12. When the trial court fails to state in the order the reasons for setting aside a verdict and granting a new trial, the presumption is that it was granted because the court thought the verdict was against the weight of the evidence. *Mills v. Conley,* 525

13. Where in an action to foreclose a mortgage the bill of exceptions does not contain the mortgage, on appeal the court will assume that the mortgage was sufficient to support a finding that a wife intended to, and did, charge her separate estate in the mortgaged premises. *Concordia F. Ins. Co. v. Pittelkow,* 616

Case. See COSTS, 1, 3.

Brief. See COSTS, 2.

Review: Questions considered: Exceptions. See CERTIORARI. HOMESTEADS, 3. WILLS, 5.

14. The finding of a jury will be sustained where there is at least some evidence to support the conclusion reached, and counsel do not deem the point of sufficient importance to point out its weakness. *Boutin v. Etsell,* 276

15. The supreme court will not review findings of fact, in the absence of exceptions to the findings incorporated in the bill of exceptions. *Dickey v. Pugh,* 400

Same: Questions of fact.

16. The rule that a finding of facts by a trial court will not be disturbed on appeal unless it is contrary to the clear preponderance of the evidence is unbending, even though the trial judge, in rendering his opinion, stated that his impressions on the trial were different, and that he changed his mind upon taking time to study the case. *Endress v. Shove,* 141

17. There is a wide range between mere preponderance of evidence and that preponderance of evidence necessary to overcome the decision of a trial judge on controverted questions of fact; and where the evidence on a certain issue is extensive and conflicting and the appellate court cannot say that the preponderance of the evidence against the finding is so great that it could not be easily overcome by the appearance of the witnesses and other aids of the trial court not available on appeal, the finding will be sustained. *Ibid.*

18. Where there is no serious controversy that the construction of a building was in fact defective, and that the defects were noticeable to some extent at the time of an alleged settlement with the builder, the testimony of the owner that the settlement was conditional on the remedying of the defects by the builder is *held* sufficient to sustain a finding on that question in favor of the former,

although he had slept upon his rights until the statute of limitations had nearly run on his claim. *Johnson v. Pugh,* 167

19. Where in an action to foreclose a mortgage the trial court finds categorically against the defendants on the defense of duress, on appeal the finding must be taken as true when it is not antagonized by any clear preponderance of the evidence. *Concordia F. Ins. Co. v. Pittelkow,* 616

Affirmance and reversal: Material and immaterial errors. See CONTRACTS, 7. CORPORATIONS, 14. COSTS, 4, 5. EMINENT DOMAIN, 4. EXECUTIONS. HABEAS CORPUS, 7. JUDGMENTS, 3, 5. LIBEL, 1, 3. MASTER AND SERVANT, 16–19, 21, 22, 26, 27, 33, 35. MUNICIPAL CORPORATIONS, 10, 16, 18, 19. NEGLIGENCE, 3, 8, 9. REPLEVIN, 2. SALE OF CHATTELS, 6. STREET RAILWAYS, 15, 19. WILLS, 1, 2. WITNESSES, 4.

20. A mistake of the trial court in the entry of judgment, which is against the respondent, is not prejudicial to the appellant, and affords no ground for reversal. *Olson v. Sawyer-Goodman Co.* 149

21. A party not entitled to any deduction from a verdict is not prejudiced by a deduction less in amount than he claimed should have been made. *Mowatt v. Wilkinson,* 176

22. Where the only exception to an objectionable part of an instruction to the jury is reserved in connection with other parts of the same instruction that are correct, material error cannot be predicated thereon. *Dehsoy v. Milwaukee E. R. & L. Co.* 412

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Mandate directing judgment, when proper. See COSTS, 6.

23. Where it appears from the evidence that a motion, duly made, to change an answer to a question in a special verdict and for judgment should have been granted, under the rule that the appellant is entitled to have done that which ought to have been done, judgment will be entered in the appellate court remanding the cause upon reversal with directions to the trial court to correct the verdict as indicated and render judgment for the defendant. *Stafford v. Chippewa Valley E. R. Co.* 331

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BRIDGES. See HIGHWAYS, 4, 5.

BUILDING CONTRACTS. See APPEAL, 18. CONTRACTS, 2. LIENS, 1-8.

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CARRIERS.

1. Under the law of this state, a valid contract may be made limiting the common-law liability of a common carrier in any respect except exemption from the consequence of negligence. *Courteen v. Kanawha Dispatch*, 610

2. A bill of lading provided that the consigned goods should be delivered to successive carriers; that no carrier should be liable for loss or damage after they were ready for delivery to the next carrier; and that no carrier should be liable in any other respect than as warehousemen while the goods were awaiting further conveyance. The goods were to be transported by rail and steamboat, and the railroad company transported them to a seaport with proper diligence. On arrival the goods were deposited in the railroad company's warehouse ready for shipment when the boat of the connecting carrier should arrive, it having no warehouse or dock. While the goods were awaiting shipment, they were, without negligence on defendant's part, destroyed by fire. *Held*, that the railroad company was not liable under the express stipulations of the bill of lading. *Ibid.*

3. In such case the goods were "awaiting further conveyance" and "ready for delivery to the next carrier" within the meaning of the bill of lading. *Ibid.*

CASES DISTINGUISHED, ETC.

1. *Barker v. Dayton*, 28 Wis. 367 (as to receivers), followed. *Wisconsin T. Co. v. Jenkins*, 532

2. *Barth v. Loeffelholtz*, 108 Wis. 562; *Fuller-Warren Co. v. Harter*, 110 Wis. 80 (as to election of remedies), distinguished. *Clausen v. Head*, 410

3. *Bonesteel v. Orvis*, 28 Wis. 506 (as to amendment of execution), distinguished. *Davelaar v. Blue Mound I. Co.* 470, 473

4. *Carney v. L. C. & M. R. Co.* 15 Wis. 503; *Purtell v. Chicago F. & B. Co.* 74 Wis. 132 (as to right of mechanic to lien on property of *quasi*-public corporation), criticised. *Pittsburg Testing Laboratory v. Milwaukee E. R. & L. Co.* 633, 644

5. *Corwith v. State Bank*, 18 Wis. 560 (as to amendment of execution), followed. *Davelaar v. Blue Mound I. Co.* 470, 473

6. *Darcey v. Farmers' L. Co.* 87 Wis. 245; *S. C.* 98 Wis. 573. See No. 16.

7. *Fawcett v. Fawcett*, 85 Wis. 332. See No. 21.

8. *Frankland v. Moulton*, 5 Wis. 1 (as to fixtures), followed. *Fuller-Warren Co. v. Harter*, 89

9. *Fuller-Warren Co. v. Harter*, 110 Wis. 80. See No. 2.

10. *Guinard v. Knapp-Stout & Co. Company*, 95 Wis. 482 (as to unguarded machinery), distinguished and limited. *Powalske v. Cream City B. Co.* 466

11. *Hei v. Heller*, 53 Wis. 415 (as to parol evidence), distinguished. *Brader v. Brader*, 432

12. *McCarty v. Sup'rs of Ashland Co.* 61 Wis. 1 (as to right of sheriff to take an appeal in *habeas corpus* proceedings), distinguished. *State ex rel. Durner v. Huegin*, 226

13. *McDonald v. Milwaukee Co.* 41 Wis. 642 (as to employment of counsel by sheriff on *habeas corpus*), limited. *State ex rel. Durner v. Huegin*, 221

14. *Milburn, In re*, 59 Wis. 34, and other cases (as to questions reviewed on *habeas corpus*), limited. *State ex rel. Durner v. Huegin*, 238, 239

15. *Murphey v. Weil*, 86 Wis. 643. See No. 20.

16. *Nadau v. White River L. Co.* 76 Wis. 120; *Darcey v. Farmers' L. Co.* 87 Wis. 245; *S. C.* 98 Wis. 573 (as to assumption of risk), distinguished. *Williams v. J. G. Wagner Co.* 456, 460

17. *Phillips v. C., M. & St. P. R. Co.* 64 Wis. 475 (as to fellow-servants), distinguished. *MacCarthy v. Whitcomb*, 113, 121

18. *Pier v. Prouty*, 67 Wis. 218 (as to treasurer's stub book as evidence), distinguished. *McIntosh v. Marathon L. Co.* 297, 306

19. *Purtell v. Chicago F. & B. Co.* 74 Wis. 132. See No. 4.

20. *Robinson v. Washburn*, 81 Wis. 404; *Murphey v. Weil*, 86 Wis. 643 (as to appealable orders), distinguished. *Mills v. Conley*, 530

21. *Second Nat. Bank v. Merrill*, 81 Wis. 151; *Fawcett v. Fawcett*, 85 Wis. 332 (as to statute of limitations), followed. *Brader v. Brader*, 423, 426, 427

22. *Shepard v. Pebbles*, 38 Wis. 374 (as to recovery of attorney's fees from co-surety), distinguished and limited. *Boutin v. Etsell*, 276, 279

23. *State v. Kemp*, 17 Wis. 669 (as to writ of error in criminal cases), overruled. *State ex rel. Durner v. Huegin*, 224

24. *State ex rel. Att'y Gen. v. Janesville W. Co.* 92 Wis. 496 (as to sufficiency of petition in proceedings to forfeit corporate franchises), followed. *Ashland v. Ashland W. Co.* 97, 98, 100

25. *State ex rel. Dunn v. Noyes*, 87 Wis. 340 (as to review of judgments on *habeas corpus*), limited. *State ex rel. Durner v. Huegin*, 240

26. *Stedman v. Berlin*, 97 Wis. 505 (as to limitation of municipal indebtedness), approved and followed. *Herman v. Oconto*, 661, 672, 673

27. *Steele v. Schricker*, 55 Wis. 134 (as to conversations leading up to written contract), followed. *Johnson v. Pugh*, 168, 171

28. *Stewart v. Everts*, 76 Wis. 35 (as to exhibiting planks from sidewalk), distinguished. *Viellesse v. Green Bay*, 164

29. *Streeter v. Frank*, 3 Pin. 386 (as to following statutory forms), distinguished. *State ex rel. Durner v. Huegin*, 233

30. *Sutton v. Wauwatosa*, 29 Wis. 21 (as to violation of law in negligence cases), distinguished. *Welch v. Geneva*, 388, 389

31. *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436 (as to injunction *pendente lite*), distinguished. *Glassbrenner v. Groulik*, 402, 405

32. *Walker v. Grand Rapids F. M. Co.* 70 Wis. 92 (as to fixtures), distinguished. *Fuller-Warren Co. v. Harter,* 92

33. *Walton v. Goodnow,* 13 Wis. 661 (as to deficiency judgment in foreclosure), criticised. *Endress v. Shove,* 140

34. *Yates v. Shepardson,* 37 Wis. 315 (as to notice of appeal), distinguished. *Koch v. Hustis,* 63

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CERTIFICATE.
Of clerk on appeal. See APPEAL, 11.
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CERTIORARI.

1. *Certiorari* to review the action of commissioners appointed on appeal to the county judge from proceedings before town supervisors brings up for review only the proceedings of said commissioners, and does not bring up the original proceedings from which the appeal was taken; hence the question whether the original proceedings by the supervisors are void, because the statute under which they proceeded is invalid, is not before the court for review. *State ex rel. R. Connor Co. v. Wallman,* 312

2. In such case, where the petition for the writ shows that the original proceeding, and the action taken under it, are invalid, such fact only bears upon the question of whether the action of the commissioners is harmful and such as will justify the court in entertaining the writ and exercising its discretionary power, and is no ground for a motion to quash the writ. *Ibid.*

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CONSTITUTIONAL LAW.

See CRIMINAL LAW, 14. EVIDENCE, 3. WATERS, 3.

1. The restriction on taxation contained in said sec. 925—142*a*, Stats. 1898, must be deemed to have been made pursuant to the mandate of sec. 3, art. XI, Const., empowering the legislature, and charging it with the duty, to provide for the organization of cities and incorporated villages and to restrict their power of taxation so as to prevent abuses in assessments and taxation. *Somo L. Co. v. Lincoln Co.* 286

2. [Whether such provision is invalid in so far as it restricts the power of a city to levy taxes in excess of three per cent. to pay debts contracted prior to its adoption of the general charter law, not decided.] *Ibid.*

3. [Whether the question as to the violation of such restriction can be raised by a taxpayer, or whether it can only be properly raised by a bondholder, not decided.] *Ibid.*

4. A city borrowed $35.000 from the state with which to erect a high-school building, and at the time of letting a contract for the construction of a sewer about $21,000 thereof was in the treasury, and the building was in process of erection. There was no proof that any contract had been let for the school building or as to its probable cost. *Held*, that the unexpended balance should not be considered as an asset in determining whether the obligations under said sewer contract were in excess of the constitutional limit of indebtness, the presumption being that it was needed and to be used for the purpose for which it was borrowed. *Herman v. Oconto,* 660

5. Where a contract for the construction of sewers was made in October, taxes which had been apportioned by the secretary of state under sec. 1070, Stats. 1898, to pay amounts due the state January 1st, following, but which could not go into the tax collector's hands for collection until December, cannot be considered "in process of immediate collection" so as to make them assets of a city in determining whether the constitutional limit of indebtedness had been exceeded. *Ibid.*

6. Where the exact amount of indebtedness under the contract in such a case cannot be ascertained from the record, it will be assumed, in determining whether the city's indebtedness, including such contract, exceeded the constitutional limit, that the actual amount of indebtedness on such contract is the amount admitted by the city to have been earned by the contractor, independent of any deduction therefrom of damages allowed the city for failure to complete the contract within the time limited therefor. *Ibid.*

7. Contracts whereby a city had agreed to pay certain sums annually for its water supply for thirty years; certain sums monthly for electric lights for three years; and certain sums monthly for teachers' wages,— upon which nothing was due when a contract for the construction of a sewer was entered into,— cannot be included as liabilities in determining whether, by the sewer contract, the city had exceeded the constitutional limit of indebtedness. *Stedman v. Berlin,* 97 Wis. 505, approved. *Ibid.*

8. Interest on outstanding bonds of a city payable in annual instalments in the future is not a present indebtedness within the meaning of such limitation. *Ibid.*

9. Debts for the ordinary running expenses of a city, and debts within the power of a city to contract, payable within a year out of the incoming revenues actually levied or in good faith intended to be levied, are not such as are comprehended within the last clause of sec. 3, art. XI, Const., requiring any city, before or at the time of incurring any indebtedness, to provide for the collection of a direct annual tax sufficient to pay the interest as it falls due, and the principal within twenty years. If, however, the debt is made to mature at such time as would make it a charge upon the future resources of the city beyond one year, then the levy of such tax is necessary to its validity. *Ibid.*

10. Where the city charter gave the common council power to build sewers and pay the expense out of the general fund, a sewer contract, bearing no interest, payable within one year,— the city, at the time of entering into such contract, having no funds on hand with which to pay the contract price,— is not void under said sec. 3, art. XI, Const., because no provision was made at the time it was executed for the collection of a direct tax. *Ibid.*

11. A city received and retained a sewer system costing nearly $20,000, and had paid no part of the cost. The contract was in a sense entire, but it was impossible to tell from the written contract itself how much the actual contract price was. The plans, from which a division of the contract could be made, were made a part of the contract, but were not brought up with the record. *Held*, that the transaction was of such a nature that the contract might be severed and held valid up to the limit within which the city was authorized, under the constitution, to contract, and that, defendant having failed to furnish the proper data on which to apportion the invalid part, it should be scaled down to the limit within which the city had the power to contract, and held valid within that limit. *Ibid.*

CONTRACTS.

See APPEAL, 18. CARRIERS. CONSTITUTIONAL LAW, 4–11. CRIMINAL LAW, 13–16. DEEDS. EQUITY. FIXTURES. GAMING CONTRACTS. GUARDIAN AD LITEM, 1. INSURANCE. LIENS. MASTER AND SERVANT, 1–3. MUNICIPAL CORPORATIONS, 6–13. PATENTS, 3, 5. REPLEVIN, 3, 4. SALE OF CHATTELS. SPECIFIC PERFORMANCE. SURETYSHIP. WAIVER.

1. In an action to recover under a contract by which plaintiff agreed to act as housekeeper for defendant's testator during his life, hired help to be provided by him in case she was sick, in consideration of a certain sum per month and in addition $1,500 at his death unless she left her position before that time, the evidence — stated in the opinion — is *held* insufficient to require submission to the jury of the question whether deceased wrongfully prevented plaintiff from performing the contract. *Glidden v. Meyer,* 1

2. Defendant C. engaged plaintiff to drive piling and place a building thereon, so that it might be used as a boat house, and instructed him to place the piling and building in line with a certain dock. Plaintiff placed the piling and building otherwise, and testified that H., who claimed to represent C., instructed him to place them as he did. H. testified that he repeatedly told plaintiff defendant wanted the building on line with said dock. It was not shown that H. had any authority to change the contract, though it ap-

peared he had acted for C. in some matters. *Held*, that plaintiff was not justified in departing from the contract and could not recover thereunder. *Houlahan v. Clark*, 43

3. Where there is no ambiguity in a contract, either in its literal sense or when applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters. *Johnson v. Pugh*, 167

4. Where ambiguity does exist, evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the contract in the sense the parties intended, if that can be done without violence to the rules of language or of law. *Ibid.*

5. In such case, the rule is limited to proof of the situation of the parties and the circumstances characterizing the making of the contract: it does not extend to mere conversations between the parties leading up to the completion of the agreement. *Steele v. Schricker*, 55 Wis. 134, followed. *Ibid.*

6. Custom cannot be proved to vary the terms of an agreement if they are definite and unambiguous. *Mowatt v. Wilkinson*, 176

7. A provision in a contract requiring plaintiff to saw defendant's logs "as fast as I can," is not ambiguous; and in an action on such contract it is error to admit evidence of a custom to saw logs in the order in which they came to the mill, where it appears that such custom applied to cases where the contract did not provide for continuous sawing. *Ibid.*

8. To entitle a person to recover on an agreement between third persons there must not only be an *intent* to secure some benefit to him, but there must be a promise, legally enforceable. *Electric Appliance Co. v. United States F. & G. Co.* 434

9. A provision in a contract, unlimited as to time, space, and extent of trade, by which one party binds himself and his heirs not to manufacture or sell any band-fastening device of any kind or character, except that covered by a certain patent, is unreasonable and void as against public policy. *Tecktonius v. Scott*, 441

10. Defendant contracted to deliver 400 cords of shipping wood to plaintiffs, to be transported by them by boat to Milwaukee. When the vessel was tendered to defendant for loading, fifty-seven cords of inferior wood was piled on the dock in front of the wood intended for plaintiffs, and to save double handling thereof defendant contracted with the captain of the vessel to transport such wood to defendant's dock in Milwaukee for an agreed price per cord; but the captain, in violation of his contract, delivered the inferior wood to plaintiffs, which they refused to accept, but voluntarily paid the freight to the captain. *Held*, that plaintiffs did not thereby acquire a right of action against the defendant for the amount of freight so agreed upon with the captain, and that the circumstances did not authorize them to create a legal liability against the defendant for piling or storing the wood. *Sanderson v. Cream City B. Co.* 618

CONTRIBUTION. See SURETYSHIP, 1–5.

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 4, 5. MUNICIPAL CORPORATIONS, 24. NEGLIGENCE, 7. STREET RAILWAYS, 5, 7–9, 12.

CONVEYANCES. See DEEDS. EQUITY. EXECUTORS AND ADMINISTRATORS, 2.

CORPORATIONS.

See ELECTION OF REMEDIES, 3. JUDGMENTS, 6. LIENS, 5–8. MUNICIPAL CORPORATIONS. RAILROADS. RECEIVERS, 2, 11–14. STREET RAILWAYS. WITNESSES, 6.

Corporation or partnership? Status: Estoppel.

1. Where a person deals with an association of individuals as a corporation, such dealing, by estoppel, as to such transaction, fixes the status of the company to be what it was represented and recognized to be therein. *Clausen v. Head,* 405

2. Where certain persons associated together assumed to be a corporation, and as such executed an assignment for the benefit of creditors, and a creditor filed his claim in such assignment proceedings, the claim, if in existence against the association in any capacity, became a claim against the company as a corporation and the assignee in his representative capacity. *Ibid.*

3. Even though the creditor, before filing his claim, was not bound by estoppel to recognize the association, as a corporation, as his debtor, and could have proceeded against the association as a corporation, outside of or within the assignment proceedings, or against the members thereof as partners, yet having made an election between the two courses, with knowledge of the facts, by filing his claim with the assignee of the corporation as such, he thereby waived the one not chosen. *Ibid.*

4. There is no such privity between the members of a corporation and the corporation, that a judgment between a third person and the corporation is *res adjudicata* in subsequent litigation as to the same or any other cause of action between such person and the members of the corporation. *Ibid.*

Promoters: Fraud: Agency.

5. Defendant B. sold a large tract of land to the plaintiff, a corporation, organized by M. for the purchase, platting, and resale of such land. Fifteen months prior to such conveyance, B., through M., had bought the land for $7,000 less than the price received from plaintiff, and authorized M. to find a purchaser for the land, his commission to be paid by the purchaser. B. did not stand in any confidential relation to plaintiff nor any of the subscribers to its capital stock. The sale to plaintiff was brought about by M., who received from plaintiff $2,000 of its stock for his services, which fact was not known to B. B., having foreclosed the purchase-money mortgage given by plaintiff, obtained a deficiency judgment thereon; and plaintiff brought an action to enjoin the enforcement of such judgment, and to have the sale set aside for fraud. *Held,* that B. did not owe plaintiff or any of the subscribers to its capital stock any duty to refrain from making said sale. *Forest L. Co. v. Bjorkquist,* 547

6. The mere fact that B., fifteen months prior to such conveyance, had bought the land for $7,000 less than the price for which he sold it, did not tend to impeach the transaction, especially in view of a finding that the land was then worth the full consideration recited in the deed, which was more than B. actually received. *Ibid.*

7. In such case, the mere authority of M. to find a purchaser of the land did not contemplate the organization of a corporation to effectuate the purchase; and M.'s acts in assisting in the formation thereof, in the absence of showing that B. had any knowledge of

M.'s plans, or shared in any way in his profits, were outside of the real or apparent scope of his authority and did not bind B. *Ibid.*

Actions for dissolution: Leave to commence: Petition.

8. Permission to commence an action to forfeit the franchises of a corporation should not be granted on a mere petition stating grounds on information and belief, where the petition is met by an answer putting in issue all the material allegations thereof, verified upon the knowledge of the person making it, and supported by affidavits of persons competent to testify as witnesses positively denying the material facts alleged. *Ashland v. Ashland W. Co.* 94

9. The provision of sec. 3241, Stats. 1898, that "upon cause shown" an action may be brought by the attorney general or any private party in the name of the state, on leave granted by the supreme court, to vacate the charter or annul the existence of any corporation which shall misconduct itself in any of the ways enumerated, requires that the petitioner shall satisfy the court that he has at hand evidence sufficient, if unopposed, to justify the forfeiture. *Ibid.*

Insolvency: Sequestration proceedings.

10. Where on a judgment against a corporation and another the execution had been returned unsatisfied as to the corporation, and the judgment creditor, acting under sec. 3216, Stats. 1898, procured the appointment of a receiver for the corporation, the creditor is strictly within his legal rights, although it does not appear that he has exhausted his remedies against the other judgment debtor. *Davelaar v. Blue Mound I. Co.* 470

11. The fact that an execution against a corporation was returned the same day it was issued, and sequestration proceedings were immediately commenced against the corporation, does not warrant the presumption that the execution was returned by direction of plaintiff's attorneys. *Ibid.*

12. Where an execution against a corporation has been returned unsatisfied, a sequestration action against the corporation may be commenced at once, even though the sixty days within which an execution is returnable under sec. 2970, Stats. 1898, have not expired, there being no statute requiring the officer to keep the writ the full sixty days. *Ibid.*

13. In proceedings by a judgment creditor of a corporation to wind up its affairs, etc., the petition stated jurisdictional facts, but failed to state any facts to show that an emergency existed requiring the appointment of a receiver without notice to the corporation. *Held.* that the plaintiff was not entitled to the relief sought except upon notice, and that the order appointing a receiver without such notice was improvidently made and should have been set aside. *Ibid.*

14. In such case, on appeal, it is not enough that the facts stated showed the plaintiff would have been entitled to such appointment on notice, and that, after a review of the situation, the trial court decided to allow the appointment to stand. *Ibid.*

COSTS.

See JUDGMENTS, 2, 4. RECEIVERS, 14, 15.

1. A "case" which contains neither pleadings, verdict, charge, exceptions, nor evidence, except selections from the testimony of certain witnesses printed either as partisan statements or incomplete

and misleading quotations, does not comply with Supreme Court Rule VIII, requiring so much of the record to be printed as shall be necessary to a full understanding of the question presented for review; and no costs can be taxed for printing it. *Dufur v. Paulson.* 281

2. Under Supreme Court Rule XXVII no costs will be allowed for printing a brief containing language disrespectful to the trial court. *Ibid.*

3. Costs will not be taxed for printing voluminous parts of the testimony, as to which no question is raised on appeal, and instructions upon various questions, not assailed. *Dehsoy v. Milwaukee E. R. & L. Co.* 412

4. Where one party obtains an order setting aside a verdict as against the evidence and granting a new trial, it is error to impose costs on the other party. *Mills v. Conley,* 525

5. Under sec. 2686, Stats. 1898, an order awarding absolutely $10 costs on overruling a demurrer is erroneous; such costs are only admissible as terms to leave to interpose some further plea. *Case v. Fuldner,* 568

6. On a general appeal from such order, no question being raised but that it was proper except as to costs, the order will be reversed as to costs and otherwise affirmed. *Ibid.*

COUNTY COURTS. See COURTS.

COURT AND JURY.

See CONTRACTS, 1. LIBEL, 5. MASTER AND SERVANT, 26, 29, 30, 33. MUNICIPAL CORPORATIONS, 3, 24. SALE OF CHATTELS, 5, 6. STREET RAILWAYS, 5, 10, 11, 13, 18.

It is for the court to determine the effect and weight of the testimony and evidence, and where the physical situations or matters of common knowledge, based on reason and common sense, point so certainly to the truth as to leave no room for a contrary determination, the mere fact that sworn testimony is produced in court to establish a contrary conclusion, even though not disputed by other sworn testimony, does not warrant the submission of the question to the jury. *Croth v. Thomann,* 488

COURTS.

See APPEAL, 1. GUARDIAN AD LITEM, 2–5. GUARDIAN AND WARD, 6, 7. HABEAS CORPUS, 8, 9. MORTGAGES, 2, 5. MUNICIPAL CORPORATIONS, 11. PROCESS, 5.

The jurisdiction, in civil actions, of the county court of Waukesha county is limited to $25,000. In an action to abate a nuisance it appeared that the value of plaintiff's land was $10,000; that the damages claimed were $6,000, and that the nuisance could be abated by appliances costing about $5,000. *Held,* that there was nothing in the record, on any theory of the value or amount in controversy, to support a contention that the jurisdictional limit was transcended. *Winchell v. Waukesha,* 101

COUNTERCLAIM. See MUNICIPAL CORPORATIONS, 10, 14. REPLEVIN, 3.

CRIMINAL LAW AND PRACTICE.

See HABEAS CORPUS, 1-7.

Preliminary examination.

1. A preliminary examination is not an action. The determination thereof is not a final judgment. The proceeding is not according to the course of the common law; it is purely statutory, and compliance with the statute is requisite to jurisdiction at every step. *State ex rel. Duruer v. Huegin,* 189

2. An examination to determine whether a criminal prosecution shall be commenced is a judicial proceeding in that, so far as the magistrate acts within his jurisdiction, his decision is as binding for the purposes of such proceeding when it is right as when it is wrong. But, like the situation where a board is authorized by statute to act in a *quasi*-judicial capacity upon evidence, if there is no evidence reasonably permitting of action, a decision upon a contrary theory is in excess of jurisdiction. *Ibid.*

Complaint and warrant of commitment.

3. A warrant of commitment for trial which states the offense charged with convenient certainty is sufficient if good in all other respects. *State ex rel. Durner v. Huegin,* 189

4. The formal language, "against the peace and dignity of the state of Wisconsin and the statutes in such case made and provided," or equivalent formal words, is unnecessary to either a criminal complaint or warrant of commitment for trial. *Ibid.*

5. The rule of convenient certainty as to describing the offense in a warrant of commitment does not require the facts to be stated in detail. A statement thereof according to their legal effect is sufficient. *Ibid.*

6. The description of an offense in a warrant of commitment by its generic name, if it has one, whether the offense be statutory or one known to the common law, states by reasonable inference all the facts requisite to such offense. *Ibid.*

7. The statutory form for a commitment found in sec. 4774, Stats. 1898, is satisfied by the use of language including all material elements, though such language departs from the particular wording of the form. *Ibid.*

8. The rule that a form prescribed by statute must be strictly followed, does not mean literally followed unless the statute clearly so indicates. That is not the case with sec. 4774, Stats. 1898. *Ibid.*

9. When a complaint charges the offense of conspiracy in the language of the statute, and a conspiracy to carry out the particular purpose of such conspiracy in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage in construing the complaint, but the two charges of conspiracy may be read together as charging a conspiracy of the nature indicated by the particular allegations as regards the method adopted for effecting the criminal purpose. *Ibid.*

10. A complaint stating that three persons, naming them, concerted together, using substantially the language of the statute, for the purpose of maliciously injuring another in his business, describes the conspiracy made criminal by sec. 4466*a*, Stats. 1898. *Ibid.*

Conspiracy to injure.

11. The doctrine that, where concert of action is necessary to an offense, a charge of criminal conspiracy does not lie, does not apply where the unlawful agreement is of itself an offense, but applies only where the agreement and the consummation thereof are so closely connected that the two constitute really but one offense, as in the case of the offense of adultery or that of bigamy. *State ex rel. Durner v. Huegin*, 189

12. Where concert is not a mere part of a criminal act, but is in aid of it and is itself criminal, the charge of conspiracy will lie against those concerting together to perpetrate such act, though only one of the parties, or neither one alone, could effect such purpose. *Ibid.*

13. An agreement between several independent concerns, each publishing a newspaper and furnishing thereby means for advertising, to compel a fourth person engaged in like business to reduce his rates for advertising or lose customers, indicates a malicious purpose to injure the business of the latter within the meaning of sec. 4466*a*, Stats. 1898. *Ibid.*

14. If sec. 4466*a* be regarded as describing a conspiracy between owners of independent enterprises to control the rates charged in their line of work in any locality, great or small, it is not constitutional. However, it cannot be so regarded, for it makes the malicious purpose to injure an essential. *Ibid.*

15. Several persons, conducting independent business enterprises, may, in the absence of a statute, combine to control prices for the purpose of promoting their individual interests, and in their operations to that end impoverish a rival and drive him out of business, there being no malicious intent in their conduct, using the term in the sense of malice in law. Sec. 4466*a* does not go that far. *Ibid.*

16. All agreements to maliciously injure another in any way are contrary to the policy of the law. Legislative authority is ample to outlaw such agreements to the extent of making the participants therein liable civilly and criminally. *Ibid.*

17. A conspiracy to wrongfully injure another is actionable at the common law if executed to the damage of another, whether that other would have a remedy if the act were committed by a single person or not, or whether one person could commit such injury alone. *Ibid.*

18. The doctrine that an act which is not actionable if done by one is not when done by many, is not the law of this state. Neither is the doctrine, as applied to a combination of persons to wrongfully injure another, that an act, lawful without malice, does not become unlawful by adding such element. *Ibid.*

19. A combination of persons to injure another without any just cause, such as an injury that is not an incidental effect of the promotion of the legitimate interests of the members of the combine, is a conspiracy to inflict a a malicious injury upon another at common law, and is such an injury under the statute (sec. 4466*a*, Stats. 1898) if it relates to such other's reputation, business, trade, or profession. *Ibid.*

20. A combination of individuals for the purpose of inflicting a malicious injury upon another, is in effect an agreement to injure by violence. It was the policy of the common law, as it is of the statute, to prevent such a wrong by civil and criminal liabilities. *Ibid.*

21. The term "malicious injury," as used in the statute, is synonymous with that term in the law of conspiracy independent of the statute. *Ibid.*

22. Sec. 4466*a*, Stats. 1898, is a mere declaration of the common law. Its only effect is, as to the particular matters stated therein, to remove the necessity for an overt act, which is required by the change in the common law by sec. 4568. *Ibid.*

CROSS-EXAMINATION. See WITNESSES, 6.

CUSTODY
Of infants. See GUARDIAN AND WARD, 6-8. HABEAS CORPUS, 8.
Of law. See RECEIVERS, 15.

CUSTOM AND USAGE. See CONTRACTS, 6, 7. MUNICIPAL CORPORATIONS, 10.

DAMAGES. See LIBEL, 4. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 9. RAILROADS, 6, 8, 11. REPLEVIN. SALE OF CHATTELS, 1, 2, 4. SURETYSHIP, 1, 2, 4, 5. WATERS.

DEBTOR AND CREDITOR. See CORPORATIONS, 1-4, 10-14. EVIDENCE, 5. EXECUTIONS. FRAUDULENT CONVEYANCES. GARNISHMENT. HOMESTEADS. MORTGAGES, 1-5. RECEIVERS, 1. SURETYSHIP.

DEDICATION. See RAILROADS, 1-6.

DEEDS.

See CORPORATIONS, 5, 6. EQUITY. FRAUD. QUIETING TITLE, 1, 2. RAILROADS, 1-6. STREET RAILWAYS, 3. TAX TITLES.

1. An agreement between a husband and wife whereby he conveys land to her absolutely on a consideration that she is to have a life estate, with power to consume so much of the *corpus* of the property as should be necessary for her support, and that the remainder is to go to a daughter, is not within or affected by the rule that, where there is an absolute grant coupled with a right inconsistent therewith, such right, to the extent of such inconsistency, must fail. The right of the daughter to take what was left is in no way inconsistent with the primary right vested in the wife. *Post v. Campbell,* 378

2. Plaintiff deeded her farm for an expressed consideration of $2,000, then paid her by the grantee in the form of four promissory notes of $500 each. *Held,* that it might be shown by other evidence that such consideration also included a settlement of certain claims then existing between the parties, which were consistent with and did not contradict any effective part of the writing. CASSODAY, C. J., dissenting, is of the opinion that the deed and notes should be considered as one paper in law, signed by both parties, and conclusively presumed to include the whole agreement, and that evidence of contemporaneous agreements between the same parties was therefore properly excluded. *Brader v. Brader,* 423

DEFAULT. See JUDGMENTS, 5. PROCESS, 3.

DELUSIONS. See WILLS, 2.

DEMURRER. See COSTS, 5. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 12-14. PLEADING, 3, 4. QUIETING TITLE, 4, 5.

DEPOSITIONS. See WITNESSES, 6, 7.

DIRECTING VERDICT. See STREET RAILWAYS, 18.

DISCRETION. See CERTIORARI. INJUNCTIONS, 4. MUNICIPAL CORPORATIONS, 15. RECEIVERS, 2.

DISMISSAL.
Of action. See SPECIFIC PERFORMANCE.
Of appeal. See APPEAL, 1, 8, 11.
DISSOLUTION of corporation. See CORPORATIONS, 8, 9.

ELECTION OF REMEDIES.

See CORPORATIONS, 1–4. LIENS, 7, 8.

1. The rule that a choice of one of two inconsistent remedies or causes of action waives the other, applies only where there are two such remedies or causes of action. *Fuller-Warren Co. v. Harter,* 80
2. If a person pursues a cause of action which he erroneously supposes he has and is defeated because of the error, he is not precluded thereby from suing over upon the proper cause of action. *Ibid.*
3. The principle that a person may sue a corporation and proceed to final judgment without prejudice to his thereafter suing upon the same cause of action, or another cause of action involving the same wrong, against the members of such corporation, applies where there are independent causes of action or remedies against such members and the corporation, that may be pursued regardless of each other, for independent satisfactions where there are independent wrongs, or a single satisfaction where there is but a single wrong, and the two remedies are not inconsistent. *Clausen v. Head,* 405
4. The doctrine that intent to make choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the pursuit of one of the remedies, applies only where action in the first instance was taken in ignorance of the facts; but where knowledge of the facts exists, intent is conclusively presumed as a matter of law, and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time. *Ibid.*

ELECTRIC RAILWAY. See STREET RAILWAYS.

EMINENT DOMAIN.

See RAILROADS, 1–6. STREET RAILWAYS, 2–4.

1. Where land was taken by a street-railway company in July, 1896, and the statute (ch. 175, Laws of 1897) authorizing it to institute condemnation proceedings was published April 3, 1897, and such company failed to commence proceedings for condemnation, a petition by the landowner, presented October 9, 1899, shows such delay and omission of the corporation to acquire title as to give the landowner a right to institute proceedings. *Stewart v. Milwaukee E. R. & L. Co.* 540
2. Ch. 175, Laws of 1897, made all provisions of the Revised Statutes relative to acquiring land by railroad companies under the right of eminent domain apply to street and electric railway companies, and sec. 1852, R. S. 1878, gave railroads the right to condemn property on which tracks have been constructed without having acquired title thereto, and permitting the property owner to commence such proceedings on the failure of the company so to do. *Held,* that where a street-railway company had, with the owner's consent, entered upon the land before the passage of said ch. 175, either party had the right to proceed upon compliance with the

terms of the statute, it being the legislative intent that the statute should apply to circumstances existing at the time it took effect. *Ibid.*

3. Where the owner of lands had consented to the acts of a street railway in laying and operating its railway thereon, but had died before the passage of ch. 175, Laws of 1897, persons who took such lands by descent or otherwise from such owner may maintain proceedings to recover compensation under ch. 175. *Ibid.*

4. In condemnation proceedings where no formal finding is made on a disputed question of fact as to whether the street-railway company had obtained and paid for its right of way during the lifetime of petitioners' ancestor, a formal adjudication that the petitioners are entitled to compensation, inferentially determines that question against the street-railway company, and will not be disturbed in the absence of a decided preponderance of the evidence in favor of the company's contention. *Ibid.*

ENTIRE CONTRACT. See CONTRACTS, 1. MASTER AND SERVANT, 1–3.

EQUITY.

See ACTION. FRAUD. FRAUDULENT CONVEYANCES. INJUNCTION. MORTGAGES. NUISANCES. QUIETING TITLE. SPECIFIC PERFORMANCE. WATERS.

The doctrine that he who comes into equity must come with clean hands applies where the plaintiff has been guilty of some conduct contrary to good conscience inrespect to the subject of the litigation or some matter connected therewith and affected thereby; thus where a husband conveys property to his wife under an oral agreement that the wife is to have only a life estate, and that the remainder is to go to his daughter, and the wife after his death remarries, the fact that the daughter fails to render aid to her mother when sick is not such inequitable conduct on her part as will prevent the daughter from maintaining a suit in equity to establish her right to the land as against the second husband, to whom the wife had attempted to convey the fee. *Post v. Campbell,* 378

ERASURES. See APPEAL, 9. QUIETING TITLE, 1.

ESTATES OF DECEDENTS. See CONTRACTS, 1. DEEDS, 2. EXECUTORS AND ADMINISTRATORS. INSURANCE, 5. WILLS. WITNESSES, 1–5.

ESTOPPEL. See CORPORATIONS, 1, 3. HOMESTEADS, 1, 2.

EVIDENCE.

See APPEAL, 10, 12, 16–19, 23. CONTRACTS, 1–6, 10. CORPORATIONS, 5, 6. COURT AND JURY. DEEDS, 2. EQUITY. EXECUTORS AND ADMINISTRATORS, 2. GUARDIAN AD LITEM, 6, 7. HABEAS CORPUS, 7. HIGHWAYS, 1, 2. HOMESTEADS, 3. INSURANCE, 3. JUDGMENTS, 1, 3. LIBEL, 4, 5. MASTER AND SERVANT, 2, 3, 5, 7, 10, 11, 16–19, 21, 24, 26, 27, 29, 30. MUNICIPAL CORPORATIONS, 5, 10, 11, 15–20, 22, 23, 25. NEGLIGENCE, 6, 7. PLEADING, 1, 2. QUIETING TITLE, 1. RAILROADS, 3–5. RECEIVERS, 12, 17. REPLEVIN, 1. SALE OF CHATTELS, 2. STREET RAILWAYS, 10, 11, 13. SURETYSHIP, 3. TAX TITLES. WATERS, 5. WILLS. WITNESSES.

1. Plaintiff leased a summer hotel and its furnishings from defendant, stipulating that he would return to defendant the same quantity

and kind of property at the termination of the lease. Plaintiff occupied the hotel two seasons, adding to the furnishings property of his own, and, on the termination of his lease, left all furnishings therein and, after due demand, replevied certain property therein, alleged to be his. On the trial defendant's son and daughter testified as to certain inventories each had made of the property in the hotel, the son's, being based on defendant's inventory made before plaintiff took possession, showed the property in the hotel before plaintiff went into possession, the articles he had left, the excess of property, and also the articles missing. Plaintiff offered similar memoranda prepared by his witnesses. *Held*, that such memoranda were properly received in evidence as part of the testimony of the witnesses. *Bourda v. Jones*, 52

2. Evidence as to the value of household furniture which had been used in an hotel from one to five years, based on the theory that it was worth as much as when new, is contrary to all reasonable probabilities, and may be disregarded even though uncontradicted. *Ibid.*

3. A duly authenticated copy of a will probated in Pennsylvania did not show any formal order or judgment admitting the will to probate. A decision of the supreme court of Pennsylvania, introduced in evidence, and the testimony of a member of the Pennsylvania bar, showed that a formal order or decree of probate is not usual in that state, and that the papers offered in evidence would be admitted in any court of Pennsylvania as proving that the will in question was properly proven and admitted to probate. *Held* that, under sec. 1, art. IV, Const. of U. S., the copy of the will was admissible in evidence in the courts of Wisconsin. *McIntosh v. Marathon L. Co.* 296

4. It is only when the memory needs assistance that resort may be had to memoranda to refresh the memory of a witness, and where a witness does not admit weakness of memory or inability to remember the facts as he understands them, no proper foundation is laid for the use of such memoranda and they should be promptly ruled out. *Coxe Bros. & Co. v. Milbrath*, 499

5. Where a suit is brought against the guarantor of the credit of a debtor, and the guarantor relies on a payment made by the debtor, alleged to have been applied in payment of the account sued on, conversations between the debtor and plaintiff's agent as to the state of the account, and letters written by the debtor to such agent requesting him to misrepresent to the guarantor the state of the account, are irrelevant and not admissible against the guarantor's objection. *Ibid.*

6. Had such letters and the conversations related only to matters of impeachment, a general objection would be a waiver of the failure to lay a proper foundation for the evidence. *Ibid.*

7. A letter written three days before the transaction in issue is not admissible as a part of the *res gestæ*. *Ibid.*

EXAMINATION of adverse party. See WITNESSES, 6, 7.

EXCEPTIONS. See APPEAL, 13–15, 22. NEGLIGENCE, 3, 4. WITNESSES, 7.

EXCESSIVE DAMAGES. See RAILROADS, 11.

EXECUTIONS.

See CORPORATIONS, 10, 11.

1. Under sec. 2830, Stats. 1898, where an execution was issued out of the superior court of Milwaukee county, but by mistake the seal of the circuit court for that county was affixed, it is not error to permit the amendment thereof by affixing the proper seal. *Corwith v. State Bank*, 18 Wis. 560, followed. *Davelaar v. Blue Mound I. Co.* 470

2. In such case it is not error to allow such amendment on the hearing of a motion by the execution debtor to vacate proceedings under the writ, where the objections to the proceedings attacked covered other grounds than the defect in the execution, and the irregularity was not mentioned in the moving papers. *Bonesteel v. Orvis*, 23 Wis. 506, distinguished. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

See APPEAL, 2. INSURANCE, 2. WILLS.

1. Sec. 2295, Stats. 1898, and sec. 3267, are independent sections, intended to cover different situations, sec. 2295 covering cases where, by the terms of the will, lands are devised or authority given to convey, and sec. 3267 cases where the executor or administrator must obtain judicial authority to sell or convey. *McIntosh v. Marathon L. Co.* 296

2. If the papers attached to the copy of a will, which devised the real property of the testator wherever situate to S. W., appointed her executrix, and authorized her to sell said real estate, show that the will was duly admitted to probate in another state, and are properly authenticated, the copy becomes entitled to record in the office of the proper register of deeds in this state under sec. 2295, and when so recorded becomes presumptive evidence of the authority of S. W. to convey the lands of the testator in this state. *Ibid.*

EXEMPTION from taxation. See MUNICIPAL CORPORATIONS, 7.

EXEMPTIONS. See HOMESTEADS.

EXHIBITS. See MUNICIPAL CORPORATIONS, 17.

EXPERT TESTIMONY. See MUNICIPAL CORPORATIONS, 18.

FAMILY. See HOMESTEADS, 1. INSURANCE, 1, 3, 4.

FELLOW-SERVANTS. See MASTER AND SERVANT, 25, 31–34. RAILROADS, 7, 8.

FINDING. See APPEAL, 13–19. EMINENT DOMAIN, 4. HOMESTEADS, 8. MASTER AND SERVANT, 2. NEGLIGENCE, 6, 7, 9. SPECIFIC PERFORMANCE. SURETYSHIP, 3. WILLS, 4.

FIRE ESCAPES. See MASTER AND SERVANT, 36.

FIXTURES.

1. The vendor of personal property sold to be and in fact attached to real estate by the owner thereof or with his consent, as a permanent improvement, may by contract with such owner preserve the chattel character of the accession. *Fuller-Warren Co. v. Harter*, 80

2. In the circumstances stated, the character of the accession cannot be preserved by contract between the vendor and vendee of the personalty as against the owner of a mortgage of the realty exist-

ing when the accession is made, who is not a party to such contract. *Ibid.*

3. A contract between a vendor and vendee of personal property to be incorporated into the real estate of the latter as a permanent improvement thereof, such realty being incumbered by mortgage and the mortgagee not being a party to the contract, reserving the title to or any lesser interest in the subject of the sale after such improvement, for any purpose, is invalid as to the mortgagee. *Ibid.*

4. Personal property annexed to mortgaged real estate which, as between mortgagor and mortgagee, becomes part of the mortgage security, becomes such as between the latter and a third person regardless of any contract between the former and such person and whether the removal thereof from the building can be effected without material injury thereto or to the value of the mortgage security as it existed prior to the accession. *Ibid.*

FORECLOSURE. See APPEAL, 18, 19. LIENS. MORTGAGES. PLEADING. WILLS, 5, 6.

FOREIGN LAWS. See EVIDENCE, 3. RAILROADS, 8.

FORFEITURES. See CORPORATIONS, 8, 9.

FORMS. See CRIMINAL LAW, 7, 8.

FRANCHISES. See CORPORATIONS, 8. MUNICIPAL CORPORATIONS, 2, 5–10. STREET RAILWAYS, 1.

FRAUD.

See CORPORATIONS, 5–7. FRAUDULENT CONVEYANCES. MUNICIPAL CORPORATIONS, 11. RECEIVERS, 1.

In an action to set aside a deed it appeared, among other things, that six months before her death, the grantee, a woman about seventy-seven years of age, made a will disposing of her property among her children; that nine days before her death, when she was weak from long sickness, two of her sons, by threats and artifice, persuaded her to destroy the will and deed the property to one of them; that the deed was so made and recorded, the sons agreeing to share the proceeds; and that two of the sons, one of whom was an attorney who drew the will, were in the city and, though near at hand, were not called in, but on various occasions, shortly before and after the deed was drawn, were prevented from seeing their mother in her last sickness. *Held*, sufficient to support findings that the deed was procured by fraud and undue influence. *Shawvan v. Shawvan*, 590

FRAUDULENT CONVEYANCES.

See FRAUD. RECEIVERS, 1.

Plaintiff at and before her marriage owned a piano, and on her husband's request and his promise to buy her another gave the old one to her father. Afterwards, and while doing a profitable business, with no judgments or suits pending against him, he bought and gave her the piano in question. More than a year thereafter he made a voluntary assignment for the benefit of creditors, up to which time a creditor who recovered judgment subsequent to the assignment, with his wife and daughter, were depositors in the husband's bank. At the time the piano was given, plaintiff's husband owed five dollars as deposits to such creditor's wife and

daughter, but none to him. It did not appear that the piano was purchased with intent to defraud existing or subsequent creditors, or that the plaintiff knew or participated in any such intent. *Held* that, even though the husband was insolvent at the time of the purchase in the sense that his resources were insufficient to pay all his liabilities, the transfer was not fraudulent as against such creditor. *Probert v. Sonju,* 181

GAMING CONTRACTS.

Plaintiff worked in defendant's lumber camp, and played poker with its other employees including R., who was its time-keeper and book-keeper, and who also had charge of a supply department maintained in its camp. There was no money in the camp, and R. agreed to let the winners have goods out of defendant's store equal to the amount of their winnings, and charge the same to the losers, which was done, the plan of operating being carried on with the knowledge and acquiescence of defendant's foreman. Plaintiff having brought action for wages due, the defendant claimed the right to apply thereon the value of goods charged against him by R. *Held,* that the whole scheme was contrary to the statutes and public policy as well, and that plaintiff was entitled to recover in full the wages due him, less the value of goods that had been delivered under said agreement by his express direction. *Olson v. Sawyer-Goodman Co.* 149

GARNISHMENT.

1. The discharge of a garnishee by a court of competent jurisdiction releases the equitable lien created by the garnishment, and protects the garnishee in disposing of the property in his hands after such judgment and prior to its reversal upon appeal, unless the lien be continued by proper order or stay of proceedings pending the appeal. *Stannard v. Youmans,* 375

2. On appeal a judgment discharging a garnishee was reversed with directions to charge the garnishee and for further proceedings according to law. *Held,* that such mandate contemplated a new trial, and that the garnishee be charged with such liability as might be developed upon such trial by the application of correct legal principles to the facts established by the evidence. *Ibid.*

3. Under sec. 2756, Stats. 1898, if a garnishee summons was not served upon the principal defendant and the sheriff's return of service fails to show that after due diligence such service could not be made within Wisconsin, the service becomes void and of no effect from the beginning. *Smith, Thorndike & Brown Co. v. Mutual F. Ins. Co.* 602

4. The service, or inability after due diligence to serve, upon the principal defendant, is not made jurisdictional, but a condition subsequent is provided whereby jurisdiction once acquired shall be lost, unless there be such service in fact within ten days, or in lieu thereof a showing in the sheriff's return or other proof of service that such service cannot be made. *Ibid.*

5. Where prior to a motion to amend the sheriff's return in such a case the garnishees paid over the moneys to the principal defendant, the service cannot be revived and validated so as to charge the garnishee again for the money. MARSHALL, J., concurs solely because it appeared that in the interim between the service on the gar-

nishees and the motion for leave to amend the sheriff's return, the garnishees had, by payment, ceased to be the debtors of the principal defendants. *Ibid.*

GIFTS. See FRAUDULENT CONVEYANCES. WILLS, 5, 6.

GROSS NEGLIGENCE. See NEGLIGENCE, 2. STREET RAILWAYS, 7.

GUARANTY. See EVIDENCE, 5. JUDGMENTS, 6. SURETYSHIP, 7, 8.

GUARDIAN AD LITEM.

1. An attorney agreed to accept an appointment as guardian *ad litem* in a proposed suit, and conduct the litigation therein for his wards, for a specified sum in the trial court and for a like sum in the supreme court on appeal. After trial in the circuit court, he was paid the sum agreed upon for services in that court, and receipted in full therefor. Thereafter the opposing attorney was changed, and the guardian *ad litem's* right to appeal from a judgment adverse to his wards was opposed, and his motives impugned, and the general guardian of his wards attempted to secure his removal, and not only refused him aid but opposed all his efforts in behalf of his wards. The guardian *ad litem* nevertheless prosecuted his appeal, succeeded in reversing the adverse judgment, and vindicated and secured his wards' rights to real estate of large value. *Held*, that the guardian *ad litem* had been paid in full for his services in the trial court, but that he was entitled to compensation for services on the appeal, independent of the agreement, the circumstances being so changed from those contemplated when the agreement was made that he was not bound thereby. *Richardson v. Tyson*, 572

2. Where a guardian *ad litem* deems it necessary to employ counsel to assist in the litigation, it is the better practice to apply to the court appointing him for leave to do so, and such court, in granting leave, should fix the amount that may be expended for that purpose, and, if such amount proves insufficient, the court, on being satisfied of the fact, may increase it. If the guardian *ad litem* employs counsel without such order, he assumes the peril that his disbursements therefor may be disapproved. *Ibid.*

3. In such situation, however, where no order is made, if it appears that the employment of counsel was reasonably necessary for the welfare of the wards and such as the court would have authorized in advance had application been made, reasonable expenses in that regard should be allowed, to be paid out of the wards' estate. *Ibid.*

4. Where a guardian *ad litem* acts fairly, makes full disclosures, and does not make unreasonable demands for credit or allowance, it is within the discretion of the court to allow him compensation for his services on the hearing of his account, and, when necessary, for attorney's fees paid by him on such hearing. *Ibid.*

5. When vehement contention as to the services and disbursements of a guardian *ad litem* is made, a situation is presented of such extraordinary circumstances as warrants the employment by the guardian of a hired advocate to assist him, and in such case there is no absolute limit to the *power* of the court to allow, as a disbursement to such guardian, attorney's fees incurred therefor. *Ibid.*

6. Services performed by an attorney employed by a guardian *ad litem* prior to a contest over the settlement of his accounts being such as the guardian himself was in duty bound to perform, no allow-

ance can be made to the guardian therefor as a distinctive item of disbursement, but evidence of such services is admissible as bearing on the proper allowance to be made the guardian for his services. *Ibid.*

7. A guardian *ad litem* being an officer of the court, his compensation is to be fixed by the standard of official emoluments, rather than by the highest prices demanded and paid between individuals free to contract as they will; and in arriving at a conclusion as to the correct allowance the opinions of others in the profession of law are advisory only, and though unanimous are not controlling. *Ibid.*

GUARDIAN AND WARD.

See GUARDIAN AD LITEM. HABEAS CORPUS, 8. INSURANCE, 2.

1. Where a widow, who was designated in a certificate of membership in a mutual benefit society as trustee for certain children of her husband, was appointed guardian of such children, and subsequently received the proceeds as trustee, the ownership thereof by her wards being clear and unambiguous, she is liable as guardian from the time the money was paid to her. *Hutson v. Jenson,* 26

2. A mother, who was also guardian of her minor children, filed a report stating that all of said minors were living with her, and that she made no change at that time on account of expenses, such as board and clothing, for any of the wards, and they continued to reside with her until her death, six months later, without her having receded from such expressed intention. *Held,* that the sureties on the guardian's bond were not entitled to an allowance for such board and clothing, when sued for a balance due from their principal. *Ibid.*

3. Where a guardian ostensibly invested her ward's money in a loan to herself, giving notes and mortgages on her own property to her wards, the transaction cannot be treated as in any respect an investment of the trust funds. *Ibid.*

4. In such case the mortgage may be treated as an application by the guardian of so much of her property to a repayment of the money improperly diverted, and, in an action therefor against the sureties on her bond, they are entitled to credit for all sums realized thereon. *Ibid.*

5. Where a guardian ostensibly invested her wards' funds by a loan to herself, giving notes secured by mortgage on her own property, and a subsequent guardian, by pledging such securities, raised money which he expended for the wards' benefit, in an action against the sureties of the first guardian to recover such funds so wrongfully loaned, the sureties are entitled to a credit for the amount so expended by the second guardian for the wards. *Ibid.*

6. The circuit courts of this state, in dealing with the subject of guardianship and custody of minors, act *judicially* as courts, with all the powers, ancient and modern, of both chancellor and the court of chancery, and may, in a proper case, override alike the natural rights of the parents, and the legal rights of those to whom guardianship has been accorded, either under police power or other statutory authority, and so direct with reference to the minor's custody as to promote its best welfare. *In re Stittgen,* 635

7. In a divorce action in the circuit court the custody of petitioner's minor daughter was awarded to her. Thereafter, on application to the county judge under sec. 4587*b*, Stats. 1898, petitioner was

adjudged an unfit person to have the custody of her daughter, who was committed to the custody of the superintendent of a society for the care of children, whence, by *habeas corpus*, petitioner again gained control of the child, the superintendent being unwilling to defend against the proceedings. Thereafter the child's uncle petitioned said circuit court for the appointment of a guardian of the person of the child, alleging that the mother was an unfit person to have its custody, which was established on a trial, and that court appointed the child's aunt guardian and ordered the mother to deliver the child to her. *Held*, that the previous proceeding did not forestall the powers of the circuit court, nor exclude it from considering and deciding that the child's welfare required her withdrawal from the control and custody of her mother and committal to that of the guardian, and such decision will not be reviewed on *habeas corpus*. *Ibid.*

8. In such case, it affirmatively appearing that petitioner's character, life, and surroundings were unfit for contact with the child, the supreme court would, in *habeas corpus* proceedings, deny the relief asked, even were the guardian's custody of the child unsupported by any order of court or other legal right. *Ibid.*

HABEAS CORPUS.

See APPEAL, 4. GUARDIAN AND WARD, 7, 8.

1. The statutory and judicial policy which precludes a private attorney from appearing for the state in a criminal case in a trial or appellate court except by a special appointment for that purpose, does not apply to *habeas corpus* proceedings. *State ex rel. Durner v. Huegin*, 189

2. While an attorney cannot appear on the side of the state in a *habeas corpus* suit at public expense, he may appear by request of the proper officer at private expense, to represent the interests of the state, and he may appear regardless of such consent to represent the person charged with the wrong. *Ibid.*

3. Regardless of what a *habeas corpus* proceeding should be called under the Code, which divides all judicial proceedings into actions and special proceedings, it is to all intents and purposes a civil suit — a proceeding in the nature of a civil action — in which the party seeking to establish his right to personal liberty is plaintiff within the meaning of sec. 2601, Stats. 1898, regardless of the name by which such a party is commonly known, and the person charged with the wrong is an adverse party, to all intents and purposes a defendant, regardless of the name by which such a person is commonly known in such a proceeding. *Ibid.*

4. An order or judgment in a *habeas corpus* suit is *res adjudicata* as to the person charged with unlawfully restraining another of his liberty, till reversed in some proper proceeding. *Ibid.*

5. Upon proceedings before a committing magistrate being properly brought to the attention of the court for review in *habeas corpus* proceedings, the court has jurisdiction to examine into the sufficiency of the complaint to charge a criminal offense, and of the evidence as regards whether it will admit of a reasonable inference of the existence of the ultimate facts necessary to hold the person charged for trial, i. e., that the offense was committed and that there is probable cause for believing the accused to be guilty thereof. *Ibid.*

6. A *habeas corpus* suit reaches only jurisdictional error. It does not reach beyond the commitment to the proceedings leading up thereto where the person in custody is detained by virtue of the final judgment or order of a court having jurisdiction of the subject matter and the person. But such is not the case where the person in custody is being held on a commitment for trial. *Ibid.*

7. Where an examining magistrate acts upon evidence, and such evidence, looking at it from the most favorable standpoint, will not reasonably permit of such action. the error is jurisdictional, strictly so called, remediable by writ of *habeas corpus*, within the rule that such errors only can be reached by such writ. *Ibid.*

8. Where the circuit court has made an order relative to the guardianship and custody of an infant, the only question to be reviewed on an original writ of *habeas corpus* issued out of the supreme court is the jurisdiction of the circuit court in making such order. *In re Stittgen*, . 625

9. In such limitation of questions reviewed the word "jurisdiction" must be understood in its fullest and most comprehensive sense: the circuit court does not sit as a mere magistrate or statutory tribunal, only *quasi*-judicial in character; its jurisdiction does not depend alone upon having the subject matter legally within the scope of its powers; nor is its jurisdiction lost by disregard of procedure according to law, but if it has acquired jurisdiction of the parties, and has authority over the subject matter, that must be the end of the inquiry. *Ibid.*

HATCHWAYS. See MUNICIPAL CORPORATIONS, 21-24.

HIGHWAYS.

See CERTIORARI. MUNICIPAL CORPORATIONS, 4, 5, 15-26. RAILROADS, 1-6. STREET RAILWAYS, 2-19.

Establishment: Description.

1. Sec. 58, ch. 19, R. S. 1858, required the supervisors to make a description of a highway as laid out and "incorporate the same in an order" signed by them and recorded in the town clerk's office. Sec. 59 provided that such order "shall be *prima facie* evidence of the regularity of all the proceedings prior to the making" thereof. *Held*, that the description in such an order is conclusive as to the location of the highway and cannot be contradicted by the evidence of the person who made the survey or by his written memoranda thereof, and that, if the description is so indefinite that the highway cannot be located therefrom, the order is void. *Blair v. Milwaukee L., H. & T. Co.* 64

2. Where the monuments stated in the description of a highway as contained in the order laying it out cannot be located from such order, but only by resort to the original survey, the situation does not come within the rule that courses and distances must yield to monuments, and that in cases of ambiguity practical construction may be resorted to. *Ibid.*

Logging highway.

3. Sec. 1299*i*, Stats. 1898, provides that when a proper petition for the laying out of a temporary logging road has been presented to the supervisors of the town, such supervisors shall proceed to lay out such highway in the manner in which public highways are

laid out, except as otherwise therein provided, but does not, in express terms, give a right of appeal to the county judge, etc. *Held*, that under said statute no right of appeal exists. The fact that the supervisors are to proceed to lay out the proposed logging road in the same manner as public highways are laid out, means nothing more than that their action and course of procedure shall conform to those requirements, and to attempt to supply a grant of a right to appeal by inference is beyond the limit of judicial construction. *State ex rel. R. Connor Co. v. Wallman*, 312

Injuries from defects: Traction engines.

4. Ch. 367, Laws of 1891, provides that the person in charge of a traction engine propelled on any highway shall be liable for all damages caused to any bridge therein, if the engine weighs over five tons, or if he attempts to cross without spanning the bridge with planks. Plaintiff, with an engine weighing over five tons, attempted to cross a bridge without first spanning it. *Held*, that he could not recover for injuries caused by the breaking down of the bridge. *Welch v. Geneva*, 388

5. In such case there being a direct causal connection between the excessive weight of the engine and the accident, and the act done contributing to the result which followed, the person doing it takes the risk of injury, and is without remedy if it occurs. *Sutton v. Wauwatosa*, 29 Wis. 21, distinguished. *Ibid.*

HOMESTEADS.

1. The homestead right is not exclusively for the benefit of married women: it extends to the whole family, and prevents the doctrine of equitable estoppel from nullifying the statutory requisites to the alienability of a homestead. *Minnesota S. Co. v. McCrossen*, 316

2. A husband, acting under a power of attorney from his wife to sell and convey any lands in which she might have an interest, executed and delivered a mortgage on their homestead by signing the wife's name, in order to secure the payment of money borrowed for the benefit of the wife and which she actually accepted and used, she orally consenting thereto. *Held*, that the wife was not estopped to deny the validity of the mortgage. *Ibid.*

3. Where the owner of a homestead testified that his moving with his family to a distant state, where he remained more than three years, was temporary and without intent to abandon his homestead, and the circumstance that the moving was for the sole purpose of benefiting his wife's health was established by his own evidence and that of other witnesses, the fact that while in the state to which he moved he voted at general and municipal elections is *held* insufficient to overcome a finding of fact by the trial court that such removal was for a temporary purpose without intent to abandon the homestead, but, on the contrary, with intent to reoccupy it as such. *Ibid.*

HUSBAND AND WIFE. See APPEAL, 13. DEEDS, 1. EQUITY. FRAUDULENT CONVEYANCES. HOMESTEADS, 1, 2. LIMITATION OF ACTIONS, 1.

ICE. See MUNICIPAL CORPORATIONS, 25, 26.

IMPEACHMENT of witnesses. See EVIDENCE, 6.

INCONSISTENT limitation. See DEEDS, 2.

INCONSISTENT remedies. See ELECTION OF REMEDIES.

INFANTS. See GUARDIAN AD LITEM. GUARDIAN AND WARD. HABEAS CORPUS, 8. INSURANCE, 2. MASTER AND SERVANT, 31, 32. STREET RAILWAYS, 18.

INFERIOR COURTS. See COURTS.

INFRINGEMENT. See PATENTS.

INJUNCTION.

See NUISANCES. STREET RAILWAYS, 4. WATERS.

1. The owner of the paper title to premises claimed to be part of the bed of a navigable lake leased the premises for a term of years, and his lessee began the erection of buildings thereon. *Held*, that an injunction would not lie against the landlord to prevent such erections or to compel their removal. *Pewaukee v. Wis. Lakes I. & C. Co.* 67

2. In such case, the tenant, claiming under a conveyance made prior to the commencement of the action, is not in privity with the landlord and could in no degree be concluded by judgment against him. *Ibid.*

3. [Whether in such case the landlord might not be a proper party to an action for an injunction against the tenant, predicated upon absence of any title in either of them to the land in question, not determined.] *Ibid.*

4. Upon a complaint alleging that plaintiff, a dairyman, was the owner of certain ice, which he had allowed defendant to cut and store on premises occupied by defendant under an agreement that both parties were to use the ice, but that defendant denied him access to the premises and prevented him from using the ice, and that thereby his business would be destroyed and he would suffer irreparable injury, a preliminary injunction was granted, which was dissolved on motion founded on defendant's answer and affidavits denying such agreement. *Held*, that there was no abuse of discretion in vacating such injunction, the allegation of irreparable injury having little weight, since it is a matter of common knowledge that ice is a commodity which may at all times be purchased in the market, and it was nowhere alleged that the defendant was insolvent or that a judgment for damages against him could not be collected. *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436, distinguished. *Glassbrenner v. Groulik*, 402

INSOLVENCY. See CORPORATIONS, 10–14. FRAUDULENT CONVEYANCES. RECEIVERS, 1, 2, 11–14. SURETYSHIP, 3.

INSTRUCTIONS TO JURY.

See APPEAL, 22. LIBEL, 3. MUNICIPAL CORPORATIONS, 17, 18. NEGLIGENCE, 3. SALE OF CHATTELS, 6. STREET RAILWAYS, 14, 15, 19.

In an instruction to a jury the words "ordinarily prudent men," "the great mass of mankind" and "a person of average prudence" express synonymous terms, and when coupled with the words "ordinarily exercised under the same or similar circumstances" express the *quantum* of care required in order to meet the particular danger, or the danger of probability of injury therefrom if not effectually guarded against, as it increases or diminishes. *Stafford v. Chippewa Valley E. R. Co.* 331

INSURANCE.

Life: Benefit associations. See GUARDIAN AND WARD, 1.

1. Where in an application for insurance in a mutual benefit society the applicant declared his wish that it should be for the benefit of his "estate," but the association issued and he accepted a certificate which agreed that the association should pay the "family" of the member, the contract is expressed by the certificate, and not by the application. *Hutson v. Jenson,* 26
2. In such case, the proceeds having come to the hands of the executrix of the member, who was also guardian of minor members of his family, she is chargeable as guardian for the share thereof belonging to her wards. *Ibid.*
3. In the absence of any evidence that such applicant ever designated any beneficiary other than his "family" the fact that, after the certificate was issued, the by-laws of the society were changed so as to authorize the payment to any designated beneficiary, instead of limiting payment to the "family," is immaterial. *Ibid.*
4. Where a certificate of membership in a mutual benefit society was payable to "the family" of the member, who left children by his surviving widow and one child by a former marriage, such child is one of the class designated as "the family" of the member, and entitled to his *pro rata* share of the proceeds. *Ibid.*
5. The proceeds of a certificate of membership in a mutual benefit society, payable to designated beneficiaries, can in no proper sense be said to be any part of the estate of the member, and there can be no inference of intent to change the already designated beneficiaries by a mere residuary clause in the member's will. *Ibid.*

INTEREST. See CONTRACTS, 8. CONSTITUTIONAL LAW, 8. RECEIVERS, 2. REPLEVIN, 2.

INTENT. See ELECTION OF REMEDIES, 4.

INTERLINEATIONS. See QUIETING TITLE, 1.

INVESTMENTS. See GUARDIAN AND WARD, 3–5.

JOINDER of causes of action. See MORTGAGES, 4, 5.

JURISDICTION. See APPEAL, 1, 8. CRIMINAL LAW, 1, 2. COURTS. GARNISHMENT, 4. GUARDIAN AND WARD, 7. HABEAS CORPUS, 5–9. PROCESS, 4.

JURY. See APPEAL, 14. CONTRACTS, 1. COURT AND JURY. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 29, 30, 33. MUNICIPAL CORPORATIONS, 24. SALE OF CHATTELS, 5, 6. STREET RAILWAYS, 10, 11.

JUDGMENTS.

See APPEAL, 1, 2, 20, 23. CRIMINAL LAW, 1. MASTER AND SERVANT, 30. NEGLIGENCE, 7. RAILROADS, 11. REPLEVIN, 4.

Offer of judgment.

1. Where an offer of judgment under sec. 2789, Stats. 1898, is made, the fact that the cause proceeded to trial is ample evidence that it was refused. *Bourda v. Jones,* 52
2. An offer of judgment under sec. 2789, Stats. 1898, is a proper instrument to be in the files of the case, and, on refusal to accept, it drops out of the case until the final conclusion is reached on the facts, when, on attention being called thereto, it is the duty of the

court to recognize and consider it in determining the question of costs. *Ibid.*

3. Where an offer of judgment is made and refused, it is not error to award judgment for less than the offer, although such offer was not in evidence, said sec. 2789 prohibiting the consideration thereof by the court. *Ibid.*

4. Where plaintiffs have no right to a more favorable judgment than was offered, they can only recover costs up to the time of the offer, but must pay the defendant's costs from the time of such offer *Sanderson v. Cream City B. Co.* 618

On default.

5. Where part of the defendants were in default, a general judgment dismissing the complaint will be reversed on appeal, as no judgment could properly be rendered in favor of such defaulting defendants. *Dufur v. Paulson,* 281

For deficiency. See MORTGAGES, 4, 5.

Of dismissal. See SPECIFIC PERFORMANCE.

Res adjudicata. See CORPORATIONS, 4. GUARDIAN AND WARD, 7. HABEAS CORPUS, 4.

Vacating and setting aside. See PROCESS, 4.

Modification on appeal. See WATERS, 6.

Reversal on appeal. See APPEAL, 23.

Assignment of. See SURETYSHIP, 4, 5.

Satisfaction. See SURETYSHIP, 4.

6. A brewing company gave its note for $5,000, payable to a bank, without any consideration, and for the accommodation of P., who borrowed $5,000 from such bank and delivered the brewery company's note as collateral security therefor. Said bank gave its note for $1,500, guaranteed by P., its president, to the M. N. Bank, transferring the brewery company's note as collateral. *Held,* that the M. N. Bank had the right to bring one action against the maker and guarantor of the note given it and another upon the collateral note, and that judgment in its favor in the latter action was not satisfied by collection of the judgment in the former out of the guarantor's property, so long as his debt to the pledgor bank remained unpaid. *Flynn v. Shields,* 172

JUSTIFICATION. See LIBEL, 3.

LACHES. See PROCESS, 3.

LAKES. See INJUNCTION, 1–3. WATERS, 6.

LANDLORD AND TENANT. See INJUNCTION, 1–3.

LEGACIES. See WILLS, 5, 6.

LETTERS. See EVIDENCE, 5–7. MASTER AND SERVANT, 3.

LIABILITIES. See CONSTITUTIONAL LAW, 7–9.

LIBEL AND SLANDER.

1. Plaintiff was soliciting subscriptions for a directory he contemplated publishing, when there appeared in two newspapers an article headed "A Warning," copies of which in the shape of a circular letter were mailed by defendants to several of their customers. In an action for libel, the article, as set forth in the complaint, was to the effect that "certain unscrupulous parties, in making a pre-

tended canvass of the city for a directory, persist in falsely representing" that defendants did "not intend to publish a directory;" that "these untruthful adventurers" knew it was possible for them to secure business *only* by "misrepresentation", that the people of the city had had experience with "wandering fakirs whose whole capital" was "glowing promises and only object to capture money," and that it was "folly to pay money to irresponsible directory schemers." No objection was made that the complaint failed to allege that the article was published concerning the plaintiff, as prescribed by sec. 2677, Stats. 1898 *Held*, that the circuit court, after trial, properly allowed the complaint to be amended in that regard. *Robinson v. Eau Claire B. & S Co.* 369

2. Such article was libelous *per se*, although it did not impute a crime, since it directly tended to prejudice the plaintiff in his trade and business. *Ibid.*

3. In such case, it was error to instruct the jury to the effect that the defendants would fail on their plea of justification, even if they had proved that the plaintiff had falsely and untruthfully made the statements charged in the libel, unless they went further, and also proved that at the time of making such statements the plaintiff knew "that the defendants did not intend to issue a directory." *Ibid.*

4. In such case, evidence of the amount of money invested in plaintiff's business and the receipts arising from his sales; of the amount he expended for board while collecting pay for books delivered; and that plaintiff's directory is copyrighted, is irrelevant and its admission improper. *Ibid.*

5. In such case, where the answer admitted mailing copies of the article in question to certain of defendants' customers, but denied that it caused the publication thereof in one of the newspapers, evidence of one of the proprietors of the newspaper that he knew they had some authority to publish the article; that he did not know how they received it, nor who directed them to put it in the paper; and that the defendants might have done so, but he could not remember, is not sufficient to take to the jury the question whether defendants caused such publication. *Ibid.*

LIENS.

See GARNISHMENT, 1. MORTGAGES.

Of mechanics, etc., for labor and materials. See WAIVER, 2.

1. Where one who contracted to drive piling in a lake and place a building thereon is not entitled to recover because he has not placed the piling and building as agreed, those claiming as subcontractors for driving the piling cannot recover against the owner. *Houlahan v. Clark,* 43

2. The name of the original contractor, and the giving of notice in writing to the owner of the property affected by a claim for a subcontractor's lien, required by sec. 3315, Stats. 1898, are "material facts in relation thereto," and therefore, under sec. 3320, Stats. 1898, must be stated in the claim for lien or it is insufficient. *Scott v. Christianson,* 164

3. [Whether the notice of claim for a subcontractor's lien, if it contains the facts required under sec. 3320, Stats. 1898, to be stated in the claim for lien, and has been properly filed, may serve the purpose of such a claim, not determined.] *Ibid.*

4. A mechanic's lien being purely a statutory right, it must be pursued as the statute directs or it fails. *Ibid.*

5. Statutes giving a mechanic's lien do not extend to, and cannot be enforced against, the buildings and real estate of municipal corporations held for public use. *Electric Appliance Co. v. Unites States F. & G. Co.* 434

6. In such case where the contract provides that the plant shall be completed and ready for acceptance free and clear of all claims or liens for labor performed or material furnished, a materialman cannot maintain an action against a surety on a bond given by the contractor to the city for the faithful performance of his contract, the engagement of the surety being with the city and not with third persons. *Ibid.*

7. Under the general language of the mechanics' lien statutes, as applied to a railway or other *quasi*-public corporation, a lien may be enforced against such structures or property of the corporation as are not essential to the maintenance and operation of its road or plant for the public purposes for which it was established. *Carney v. L. C. & M. R. Co.* 15 Wis. 503, and *Purtell v. Chicago F. & B. Co.* 74 Wis. 132, criticised. *Pitisburg Testing Laboratory v. Milwaukee E. R. & L. Co.* 633

8. In an action to foreclose the lien of a subcontractor against the power house of an electric-light and street-railway company, furnishing light and power and operating a street railway for the public purposes for which it was established, it was admitted that the corporation was engaged in carrying out its purposes by means of its plant and appliances "other than the new power house" in question. *Held*, that plaintiff was entitled to such lien. *Ibid.*

On logs and timber.

9. The mere fact that one is a partner in a firm owning a part of logs driven under a "pooling" arrangement between the owners thereof, does not prevent him from purchasing lienable claims in his own behalf, and enforcing them against the logs driven, and such purchase does not constitute payment nor extinguish the liens. *Dufur v. Paulson,* 281

Of tax certificates. See MORTGAGES, 1, 2.

LIFE ESTATES. See DEEDS, 1. EQUITY. QUIETING TITLE, 2.

LIMITATION OF ACTIONS.

1. In transactions between husband and wife, the statute of limitations does not run against the wife. *Second Nat. Bank v. Merrill*, 81 Wis. 151, and *Fawcett v. Fawcett*, 85 Wis. 332, followed. CASSODAY, C. J., dissents. *Brader v. Brader,* 423

2. The limitation of time within which the notice of injury required by sec. 4222, Stats. 1898, must be served, is not a limitation upon the time within which the action must be commenced, but upon the time within which a certain prescribed act, necessary to the enforcement of the cause of action, shall be done: hence a demurrer on the ground that the action was not commenced within the time limited by law cannot be sustained, although it appears from the complaint that the notice given under sec. 4222 was not served until more than one year after the cause of action arose. *Troschansky v. Milwaukee E. R. & L. Co.* 570

LIMITATION.
Of indebtedness. See CONSTITUTIONAL LAW, 4–9, 11.
Of liability. See CARRIERS, 1, 2.
On taxation. See MUNICIPAL CORPORATIONS, 1, 2, 12, 13.

LOGS AND LUMBER. See CONTRACTS, 7. HIGHWAYS, 3. LIENS, 9.

MARRIED WOMEN. See APPEAL, 13. DEEDS, 1. EQUITY. FRAUDULENT CONVEYANCES. HOMESTEADS, 1, 2. LIMITATION OF ACTIONS, 1.

MARSHALING of expenses, etc. See RECEIVERS, 6, 7.

MASTER AND SERVANT.

Contract of employment: Discharge.

1. Where a servant, employed for a definite term, consents to the termination of his relations with his employer when he is discharged, he cannot recover wages for the balance of his term. *Bell v. Gund*, 271

2. In an action by a servant, who claimed to have been wrongfully discharged before the expiration of his term of employment, to recover for wages which accrued after the discharge, the evidence — stated in the opinion — is *held* to sustain a finding of the jury that such termination was by the consent of both parties. *Ibid.*

3. In such a case, letters of the servant, written after his discharge but before the expiration of the term, are competent as admissions on his part, so far as they are inconsistent with his claim that he was discharged against his will. *Ibid.*

Injuries to servants: Safe place to work: Assumption of risk.

4. The general rule that a master must furnish a reasonably safe place to work and reasonably safe appliances is subject to the modification that, but for positive prohibition by law, the master may construct and equip his factory as he sees fit, without liability to an employee who, with knowledge or adequate means of knowledge, chooses to take the risks thereof. *Relyea v. Tomahawk P. & P. Co.* 307

5. Plaintiff for about five years had been employed in factories, and in paper mills most of the time for three years prior to his injury, the last two and one-half months in that of the defendant. He was accustomed to use in his work a pine plank, pivoted by a bolt at one end, and resting loosely at the other on a smooth iron plate, covered with grease. *Held*, that the risk of the wearing of the plank, by continually swinging around an iron bolt as a pivot, and the probability of its slipping on the smooth and greasy iron surface, if by leaning over he subjected it to lateral pressure, were perils plain before his eyes, of which he must be deemed to have assumed the risk. *Ibid.*

6. Where the perils of the employment have developed in the natural course of the use of appliances by an employee and his companions, failure to observe them is quite as inconsistent with due care on his part as on the part of the employer or any of his representatives, and the employee must be held to have known and assumed the risks of such disrepair by continuing in the employment without protest. *Ibid.*

7. Plaintiff, thirty-six years of age, a competent machinist of fifteen years' experience, was injured by reason of the exposed condition of certain gears on a machine which he had operated for eight

months. He testified that he knew the machine and its several parts thoroughly, and that the revolving gears were in plain view at all times. *Held*, that he assumed the risks resulting from the uncovered gears. *Nadau v. White River L. Co.* 76 Wis. 120, and *Darcey v. Farmers' L. Co.* 87 Wis. 245; *S. C.* 98 Wis. 573, distinguished. *Williams v. J. G. Wagner Co.* 456

[8. Whether, under sec. 1636*j*, Stats. 1898, defendant was negligent in not covering the gearing, not decided.] *Ibid.*

9. Sec. 1636*j*, Stats. 1898, plainly contemplates that employers shall exercise ordinary judgment in determining whether machinery should be guarded, and that, in such exercise, they shall bring to bear upon the subject ordinary prudence under the circumstances of each particular case. *Powalske v. Cream City B. Co.* 461

10. Where shafting is so located that an employee must necessarily go out of his ordinary course, or any course which he might reasonably be expected to take, in order to reach it, ordinary care and prudence on the part of the master does not require it to be guarded. *Ibid.*

11. The question whether a shaft is dangerous in an unguarded condition, within the meaning of sec. 1636*j*, is not to be determined or necessarily influenced by the mere fact that an employee was injured thereby. *Ibid.*

12. A complaint alleged, among other things, that plaintiff, a carpenter, was employed by defendants to repair a roof; that while standing in the gutter at the edge of the roof, doing the work with one hand and holding on to the casing of a dormer window with the other, the casing broke, causing him to fall to the ground, and that the unsound condition of the casing was unknown to plaintiff, and could not have become known to him by the exercise of ordinary care. *Held*, that plaintiff assumed the risk of the employment, and that allegations of the complaint in regard to the assurance of safety by the master, a command by him to proceed with the work in the particular way described, and the necessity for the plaintiff to work in order to support himself and family, were immaterial. *Hencke v. Ellis*, 532

13. Allegations of the complaint in such case to the effect that the master ought to have known that the casing was insecure before sending the servant to do the work in its vicinity; that the servant relied on the master's duty in that respect without any information that the master had tested the safety of the casing; that the servant was assured that it was safe to do the work in the way directed if he exercised ordinary care, and that he exercised such care in using the casing for support as he did, the insufficiency thereof, for such purpose, being so latent as not to be discoverable by any inspection he was legally bound to make, show that the servant assumed the risk of discovering the defect in the casing, if it was discoverable by the exercise of ordinary care, and also the risk of there being a defect not so discoverable. *Ibid.*

14. In such case, an allegation that the master made a careful examination of the building in respect to its safety to sustain the weight of a person while engaged in working upon or around it, and knew or ought to have known that the casing was liable not to stand the strain put upon it when so used by the servant, does not allege that the master knew of the unsafe casing. *Ibid.*

15. To maintain an action by a servant against a master for an injury resulting from defective buildings, premises, or appliances, two

elements must concur, viz: fault or knowledge on the part of the master, and innocence of fault, or ignorance of the danger, on the part of the servant. *Ibid.*

16. In an action to recover damages for an injury caused by negligence, it is not error to exclude evidence tending to prove that after the employee was injured the defects in the machinery were repaired. *Kreider v. Wisconsin River P. & P. Co.* 645

17. In such action it is not error to sustain objections to questions asked the manager of the defendant's mill, as to whether he had ever heard, prior to the injury in question, of any one else being hurt by the appliance in question. *Ibid.*

18. Where there is other undisputed evidence on the same subject it is not error to exclude testimony by defendant's manager, who was not a practical machine man, as to his knowledge of the use, purpose, and necessity of a certain improved form of appliance. *Ibid.*

19. Neither is the exclusion of such testimony error, when there is no evidence that other employers in similar businesses and in the exercise of ordinary care and prudence were in the habit of using such improved appliances. *Ibid.*

20. An employer is not guilty of negligence merely because he does not adopt the best or most approved way and machinery. It is sufficient if, in the exercise of ordinary care and prudence, he adopts the ordinary way and machinery in use by other employers, in similar businesses. *Ibid.*

21. In an action for personal injuries received while employed in defendant's mill it is not error to exclude testimony as to the proper lighting facilities of such mill, where it appeared that the plaintiff commenced working at six o'clock in the evening of July 15, and there was nothing in the complaint or plaintiff's testimony indicating that any want of light contributed to the injury, or that the injury occurred at night, or that it was dark at the time. *Ibid.*

22. When the plaintiff in an action for personal injuries has testified fully as to the circumstances of the accident, and other witnesses have been examined, and counsel has discussed the question of the injury, and the court, in making a ruling, has commented thereon, it is not error to refuse to allow plaintiff, on being recalled, to go over his testimony again, that being a matter within the discretion of the court. *Ibid.*

23. Under sec. 1636*j*, Stats. 1898, providing that all shafting, so located as to be dangerous to employees in the discharge of their duties, shall be securely guarded or fenced, the question whether an employer is negligent in failing to guard a set-screw on a paper winder projecting nine sixteenths of an inch above the surface is for the jury. *Ibid.*

24. Plaintiff, nineteen years of age, with some experience as a factory workman, and four and one-half days' experience in defendant's paper mill, was injured while assisting to operate a paper winder. There was evidence that the nature of the work had been explained to him by the foreman, and that the plaintiff had noticed that the shaft was not moving smoothly. *Held*, that the plaintiff assumed the risk and could not recover. WINSLOW, J., dissents. *Ibid.*

25. The fact that the plaintiff was told to hold the box down by a co-employee does not affect the employer's responsibility, the latter not being responsible for any alleged misconduct of a fellow-servant in that respect. *Ibid.*

Same: Dangerous machinery: Failure to instruct or warn.

26. Where an intelligent girl over fifteen years of age was injured by having her hand caught between the roller and steam jacket of a mangle, she must be presumed to know that, if she gets her fingers caught between a roll turning inwardly from her and a surface against which it runs in contact, she will be injured. Testimony to the contrary does not raise a question for the jury, and it is material error not to recognize and act upon such presumption. *Groth v. Thomann,* 488

27. In such case where the servant testified she knew how to do her work, and that she was doing it in precisely the right way prior to the injury, with full knowledge that if she allowed her fingers to be caught in the mangle a serious injury to her would probably result, it is error to submit, as part of a special verdict, questions in respect to failure on the part of the master to instruct her as to the proper manner of doing her work. *Ibid.*

28. The duty to instruct, as between master and servant, does not exist as to dangers which are so obvious that the servant must be *held,* as a matter of law, to be as familiar with them as the master. *Ibid.*

29. Where a mangle had no discoverable defect, and was shown to have run evenly ever before and ever after the time the servant was injured, and the mechanical connections between the mangle and the motor were such that any unsteady motion was practically impossible, testimony by the servant that the injury was caused by the unsteady motion thereof is so contrary to all reasonable probabilities as not to raise a conflict of reasonable inferences for solution by the jury. *Ibid.*

30. Where in an action for injury to a servant by reason of a defect in a machine the undisputed evidence relieved the master, in the absence of actual knowledge of the defect, from any charge of negligence in not knowing thereof, and the jury found, as part of a special verdict, that the master did not have such knowledge, such finding exonerated the master from all fault, and judgment should have been rendered in his favor. *Ibid.*

Same: Negligence of fellow-servants.

31. Defendant's agent requested plaintiff, a boy fourteen years old, of ordinary health and intelligence, to assist him in putting trucks under a binder, and plaintiff was injured by the negligence of the agent in allowing the binder to tip over while plaintiff was so employed. *Held,* that plaintiff and the agent were fellow-servants of defendant, and that plaintiff was entitled to the same protection as any other servant of defendant of similar age and intelligence, and was subject to the same risks of injury from the negligence of a fellow-servant. *Wagner v. Plano Mfg. Co.* 48

32. In such case the danger of the machine falling over, being one within the common knowledge of boys as well as men, was not such a danger as called for a warning from defendant's agent before setting plaintiff at work, and failure in that regard did not constitute negligence. *Ibid.*

33. Whether two persons are fellow-servants when all the facts in respect to their several duties and lines of employment are undisputed, is a question of law for the court. While it is improper to submit such a question to the jury, their finding thereon cannot have any significance in supporting a judgment, and may be disregarded on appeal. *MacCarthy v. Whitcomb,* 113

34. Plaintiff's intestate was employed in defendant's dock yard, and, while assisting in unloading a spar from a scow, was injured by one of the skids, over which the spar was being hauled, flying up and striking him. The accident was caused by the improper construction of the skid. The skids were constructed of timbers placed on blocks by the gang of workmen with whom the intestate was working. Neither the timbers nor the blocks were defective. *Held*, that, if the skid which flew up was improperly placed or blocked, the fault was that of a co-employee, the risk of which was assumed by the deceased. *Liermann v. Milwaukee D. D. Co.* 599

Injuries to servant: Negligence: Fire escapes.

35. A factory caught fire, and a servant sustained injuries by jumping from a third-story window. In an action for such injuries it appeared, among other things, that the master maintained a vat containing inflammable material at a point from thirty to thirty-five feet from a trip hammer operated in connection with the factory; that sparks from the trip hammer would not retain sufficient heat to cause any substance to ignite for a greater distance than twenty feet; that the fire was first discovered on a rack beside the vat, the rack being used to drain articles that had been dipped into the vat; that the rack was covered at the time, but in endeavoring to put out the fire the cover was knocked off, and soon thereafter fire appeared in the vat; and that the same conditions had existed for several years without developing danger from sparks. *Held*, insufficient to support a verdict that the master was negligent in locating the vat and rack the distance they were from the trip hammer. *Dunlavey v. Racine M. & W. I. Co.* 391

36. Ch. 335, Laws of 1895, provides that every factory building three stories or more in height, in which more than twenty-five people are employed, shall be provided with iron fire escapes on the outside of the building, but that its provision shall not apply to any buildings "now erected" which are supplied with a "reasonable fire escape or fire escapes." Defendant's factory, containing more than twenty-five employees, was erected prior to the passage of said act, and was in part three stories in height. There were five windows on the side of the three-story part, which looked out on the flat roof of the two-story part, the middle window extending to the floor of the third story, and to within one foot of the flat roof, the other windows being about three feet above such roof. Along one side of the two-story part there was a lean-to, the roof of which was six or seven feet below the roof of the two-story part, and about seven feet from the ground, with a firm ladder connecting the two roofs. There were inside stairways, three or four feet wide, at each end of the three-story part, leading from floor to floor to the ground floor below. In an action for personal injuries to an employee sustained by jumping from the third-story window, the factory having caught fire, it was *held* that the factory in question was, at the time of the passage of that act, supplied with a reasonable fire escape, within the meaning of that statute. *Ibid.*

MEASURE OF DAMAGES. See REPLEVIN, 2.

MAXIMS.
De minimis non curat lex, 261.
Res adjudicata pro veritate accipitur, 239, 409.

MECHANICS' LIENS. See LIENS, 1-8.

MEMORANDA. See EVIDENCE, 1, 4. HIGHWAYS, 1. SURETYSHIP, 7.

MENTAL CAPACITY. See WILLS, 2-4.

MISCONDUCT.
Of counsel. See RAILROADS, 10, 11.
Of receiver. See RECEIVERS, 17.

MISTAKE. See APPEAL, 20.

MONUMENTS. See HIGHWAYS, 2.

MORTGAGES.

See APPEAL, 13, 19. FIXTURES, 2-4. GUARDIAN AND WARD, 3-5. PLEADING, 3. REPLEVIN, 3. SALE OF CHATTELS, 1, 3.

1. If a mortgagee of real estate, in order to protect his interest therein, pays or purchases tax claims thereon, the status of such claims, as tax liens, is thereby extinguished, but there is created, by force of the statute, a lien, in favor of the payor, upon the realty, for the amount of his expenditures and interest, secured by the mortgage, of as high a grade as the original mortgage lien. *Endress v. Shove*, 133
2. The right to the additional lien under the circumstances stated is statutory and absolute. The court has no more power to deny or diminish or refuse to enforce it against the realty, or, if the mortgagor agreed in the mortgage to pay the taxes, to refuse to enforce the amount of such lien against the mortgagor as a personal liability, than he has to arbitrarily reduce the amount actually due upon the principal debt. *Ibid.*
3. In an action to enforce a mortgage there must be a foreclosure and sale of the subject thereof adjudged as the statute provides, unless waived by the mortgagee; and that is so regardless of the interest of the mortgagor in the premises at the time of such enforcement. *Ibid.*
4. A cause of action to enforce a mortgage, and one to recover on the personal liability of the mortgagor, grow out of the same transaction and are connected with the same subject thereof, hence may be joined under the statute on that subject regardless of the statutory provision for deficiency judgments in foreclosure cases, provided no one other than the debtor is made a defendant and the two causes of action are separately stated. *Ibid.*
5. If two causes of action are joined under the circumstances above stated and a person other than the debtor is made a defendant or the causes of action are not separately stated, such defects are waived by answering the complaint, and the plaintiff is entitled to enforce both causes of action. The court has, in such circumstances, no mere equity power to refuse to grant to the plaintiff relief upon both, if the facts are sufficient for the purpose. *Ibid.*
6. A power of attorney "to sell and convey any real estate" of the grantor imports authority to sell out and out for cash, and does not include power to mortgage. *Minnesota S. Co. v. McCrossen*, 316
7. A power of attorney to sell and convey real estate cannot be extended or changed by subsequent oral authority so as to authorize the agent to mortgage the land. *Ibid.*

MUNICIPAL CORPORATIONS.

See CONSTITUTIONAL LAW. LIENS, 5, 6. STREET RAILWAYS, 4. SURETYSHIP, 6. WAIVER, 2.

Special charter cities: Reorganization: Adoption of general city charter law.

1. The general city charter law (ch. 326, Laws of 1889) provided that any city "*now incorporated*" under the laws of this state might adopt said act in the manner therein prescribed, but made no provision for its adoption by a city thereafter incorporated under a special charter. Sec. 72, ch. 312, Laws of 1893, amendatory thereof, provided that any city, "*now organized*" under a special charter, might, by ordinance, adopt the provisions of any special chapter, section, or subdivision of a section of that act, in addition to, or in lieu of, the provision of its special charter, and that when so adopted such ordinance should operate to that extent as an amendment of such special charter, but that no city should be deemed to have surrendered its special charter and become organized under such act until it should have adopted all its provisions in full. *Held*, that a city organized in 1891 under a special charter had the power to adopt the general city charter law in 1896, and that after it had taken such action taxes levied in excess of the amount authorized by said law were invalid. *Somo L. Co. v. Lincoln Co.* 286

2. The provision of the general city charter law (sec. 925—142*a*, Stats. 1898) limiting the amount which cities operating thereunder may raise by taxation in any one year is not void for uncertainty. *Ibid.*

Ordinances: Franchises: Street railways.

3. A city ordinance is not valid unless reasonable, and whether it satisfies that requirement or not is a judicial question. *Stafford v. Chippewa Valley E. R. Co.* 331

4. A city ordinance requiring the continuous ringing of a bell upon street cars while such cars are in motion upon a street is unreasonable and to that extent void for any purpose, unless made a condition of the grant of the franchise. *Ibid.*

5. If such a requirement is valid for any purpose because made a condition of the grant itself, the violation thereof does not constitute actionable negligence or evidence of such negligence, because, as regards the safety of travelers on the street, it is unreasonable. *Ibid.*

Contracts: Franchises: Waterworks.

6. The fact that a contract between a city and a water company is *ultra vires* in so far as it grants an exclusive franchise is not available as a defense in an action by the water company to recover back taxes alleged to have been levied and collected in violation of said contract. [Whether in the absence of legislative grant a city has power to grant exclusive franchises, not determined.] *Monroe Water Works Co. v. Monroe,* 11

7. A provision in such contract that the city should pay for water for municipal purposes a sum, in addition to hydrant rentals, equal to the amount of all taxes levied on certain parts of the company's plant, expressly contemplates the payment of taxes, and is therefore not invalid as an exemption from taxation. *Ibid.*

8. A provision in a contract between a city and a water company that the former should pay, in addition to hydrant rentals, a sum equal

to the amount of all taxes assessed on such portions of the plant as were located on streets and public grounds, is *held* incapable of enforcement, since taxes must be assessed in a lump sum on all the property of such a company, including its franchises, and, by the terms of the contract, no satisfactory basis of apportionment is furnished. *Ibid.*

9. Where for over six years a city paid a water company the semi-annual hydrant rentals due under its contract, and made no complaint as to the character of the services rendered, although it had full knowledge of the imperfect character thereof, such conduct amounts to a waiver of a known right, and precludes the city from recovering damages based on such insufficient service. *Ibid.*

10. Where a water company brought an action against a city, and the city set up a counterclaim for inadequate service at fires, the admission of evidence of inadequate service prior to the date from which recovery was sought, and also after the action was brought, cannot be justified on the ground that it showed habit, or custom, or course of conduct existing for a long time, it appearing from the city's bill of particulars that for a portion of those times no serious complaint was made. *Ibid.*

Contracts: Sewers: Evidence: Fraud.

11. In an action to recover under a sewer contract the answer alleged that the contract was secured by means of fraud, bribery, and corruption. The court submitted to the jury a special question, in substance, whether at or about the time the sewer contract was let the contractor or his agent paid any money to any member of the board of public works for the purpose of corruptly influencing official action, which the jury answered in the negative. *Held*, that the evidence — stated in the opinion — did not sustain the charge of bribery; that the verdict was within the allegations of the answer; and that the circumstances disclosed by the evidence were not so flagrant that the court should have gone beyond the direct issues made by the pleadings in submitting the case to the jury. *Herman v. Oconto.* 660

Contracts: Sewers: Tax levies.

12. The building of a sewer is not "a current expense" within the meaning of sec. 2, subch. V, ch. 56, Laws of 1882 (authorizing the city to annually levy a tax not exceeding one half of one per cent. to defray current expenses, and a like amount for all other purposes except payment of any outstanding obligations, etc.), but the contract being such as the city had power to make and provide for its payment out of the general fund, the debt incurred therefor is an "outstanding obligation" within the meaning of such exception. [Whether said provisions of the charter are such a limitation on the power to contract as would render a contract in excess thereof void, not decided.] *Herman v. Oconto.* 660

13. Under said charter (sec. 17, subch. VI, ch. 56, Laws of 1882), authorizing the common council to levy taxes for the several purposes mentioned "but not exceeding the authorized percentage," the percentage limit only applies to such items as are mentioned in sec. 2, subch. V. *Ibid.*

Claims: Appeal from common council: Charter provisions.

14. Sec. 48, ch. 238, Laws of 1882, provides that when a claim has been disallowed by the common council of the city of Monroe and an appeal taken, such appeal shall be tried in the same manner as

appeals from justices of the peace; and sec. 3768, Stats. 1898, provides that certain actions appealed from justices of the peace shall be tried in the appellate court as actions originally brought therein. *Held*, that when the conditions on an appeal from the action of the city council are such that a new trial in the circuit court is allowed, it is permissible to interpose a proper counterclaim. *Monroe Water Works Co. v. Monroe*, 11

Streets and sidewalks: Injuries from defects.

15. In an action against a city for personal injuries it is *held*, upon the evidence, that there was no abuse of discretion in refusing a new trial on the ground that the verdict in plaintiff's favor was contrary to the evidence. *Viellesse v. Green Bay*, 160

16. In such an action it is not error to admit testimony as to whether the plaintiff appeared to suffer pain. *Ibid.*

17. In an action against a city for injuries sustained by reason of a defective sidewalk, evidence that planks in the walk were rotten for some distance on either side of the place where the injury occurred is admissible to show that the city had notice of the bad condition of the walk, and if defendant's counsel desires that such evidence should be more restricted, he should request an instruction to that effect. *Ibid.*

18. In a suit for injuries sustained by stepping into a hole or through a rotten place in a plank in a sidewalk, the admission of expert testimony as to the probability of such accident causing certain injuries, and as to whether there was a probability of such injuries being permanent, is *held* not to have been a material error where the court charged that, if the evidence satisfied the jury to a "reasonable certainty," the plaintiff was entitled to recover, and that they might consider, in fixing the amount of damages, what amount of physical and mental suffering it was "reasonably certain" plaintiff would endure in consequence of the injury, since the jury could not have been misled by such testimony. *Ibid.*

19. Where the hole in the sidewalk and its rotten condition are conclusively established in such a case, it is not prejudicial error to allow a witness to exhibit to the jury pieces of the plank where the hole was, for the purpose of showing its condition. *Stewart v. Everts*, 76 Wis. 35, distinguished. *Ibid.*

20. In an action for injuries received by stepping into a depression in the street on alighting from a street car at a crossing, it was established by the undisputed evidence that the depression was not more than an inch and a half deep at any point. *Held*, not an actionable defect in the street, notwithstanding it was at a point where a multitude of people were constantly getting on and off the cars. *Burroughs v. Milwaukee*, 478

21. While covered coal holes and hatchways may lawfully exist in a sidewalk, yet, if they are negligently left open for such length of time that the municipal authorities ought, in the exercise of reasonable diligence, to know and remedy the mischief, the city may become liable for injuries occasioned thereby to travelers exercising ordinary care. *Stege v. Milwaukee*, 484

22. Where the lumber with which plaintiff was about to repair the steps of a house was piled in the gutter, and, before working an hour and while walking backwards in order to swing a long piece of timber around the trees, he was injured by falling into a coal hole

in the sidewalk, *held*, that plaintiff was a traveler upon the sidewalk, in that he was using it for a lawful and necessary purpose. *Ibid.*

23. In such case, it appeared that the cover of the coal hole was in no way defective or liable to slip when properly in position, but that on all pleasant days during the preceding months, and upon the day of the accident, it had been propped open a few inches, and left in that condition until the plaintiff stepped upon it and was injured. *Held*, that such condition constituted a defect in the sidewalk. *Ibid.*

24. Whether plaintiff was guilty of contributory negligence in walking backwards, and in not seeing that the cover was propped up, is *held* to have been a question for the jury. *Ibid.*

25. Plaintiff, in crossing a street at a place thirty or forty feet from the prepared crossing, slipped on an accumulation of ice. The street was sufficiently lighted. The weather had been cold, and the ice had formed from a watering trough, and extended some distance from the trough. There was evidence that the ice was rough, but nothing to show that the roughness caused plaintiff's fall. The plaintiff testified simply that she slipped upon the ice. *Held*, that the testimony did not tend to show that her fall was the result of any actionable defect in the street. *Mueller v. Milwaukee*, 623

26. [What would be the effect of ch. 305, Laws of 1899 (providing that no action based on the negligent accumulation of ice or snow upon a street shall be maintained unless the same shall have existed for three weeks), not decided.] *Ibid.*

Nuisances: Liability for maintenance.

27. A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual. *Winchell v. Waukesha*, 101

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 1, 3–5.

NEGLIGENCE.

See CARRIERS. HIGHWAYS, 4, 5. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 4–36. MUNICIPAL CORPORATIONS, 5, 15–26. PLEADING, 2. RAILROADS, 7–11. STREET RAILWAYS, 5–19. WATERS.

1. The doctrine of supervening or comparative negligence has no place in the jurisprudence of Wisconsin. *Watermolen v. Fox River E. R. & P. Co.* 153

2. The expression "gross negligence" as used by Wisconsin courts includes no degree of mere carelessness or inadvertence, however remote from the care customarily used by either the ordinarily careful man or by the exceptionally careless one, unless accompanied by intent, either actual or constructive, to cause the injury, or unless the conduct causing the injury evinces a total disregard for the safety of persons or property, so as to be little less than intentional wrong. *Ibid.*

3. An instruction in a personal injury case, in substance, that proximate cause means the efficient or inducing cause, or what sets in motion other causes producing such injury, there being an intimate and close "casual" relation between the first cause and the final result, is erroneous: the relation must be that of cause and effect in natural sequence of events, not mere coincidence of time and place. *Dehsoy v. Milwaukee E. R. & L. Co.* 412

4. It cannot be assumed in such case that the use of the word "casual" instead of the word "causal" is a typographical error, since the bill of exceptions imports absolute verity, and the sentence is neither meaningless, nor its meaning impossible or absurd. *Ibid.*

5. In actions to recover compensation for injuries on the ground of negligence, it is absolutely essential to such recovery to establish not only the breach of duty on the part of the defendant as regards the personal safety of the plaintiff, but that such breach was the proximate cause of the injury complained of, and in such actions a special verdict which contains no finding on the subject of proximate cause is fatally defective. *Groth v. Thomann,* 488

6. Plaintiff, while traveling over a street at a crossing, was injured by being run into by defendant on a bicycle. The accident occurred at night, and plaintiff, who was carrying an open umbrella and stooping down, did not look in either direction before starting to cross the street. A witness testified that he was seventy-five to one hundred feet away, but saw both plaintiff and defendant just before the accident; and defendant testified that an arc light was at the place, and that he saw the plaintiff when he came within sixty or sixty-five feet of him. *Held,* that a finding of a special verdict that plaintiff *could not,* by the exercise of ordinary care, under the existing circumstances, have seen defendant in time to have avoided the accident, was not supported by the evidence. *Mills v. Conley,* 525

7. In such case, where there was evidence to sustain a finding of the special verdict that the plaintiff was guilty of contributory negligence which was the proximate cause of the injury, and the whole verdict, except said finding as to whether plaintiff *could not* see the defendant, was allowed to stand, defendant's motion for judgment should have been granted. *Ibid.*

8. In an action for injuries received by being run into by defendant on a bicycle, a finding that plaintiff was guilty of a want of ordinary care which proximately caused the accident is *held* not to be contrary to the undisputed evidence. *Ibid.*

9. Such finding is not mere surplusage, nor contrary to a finding that plaintiff could not, by the exercise of ordinary care, under the circumstances, have seen the defendant in time to have avoided the accident. *Ibid.*

NEGOTIABLE INSTRUMENTS. See DEEDS, 2. JUDGMENTS, 6. SALE OF CHATTELS, 1, 3. WITNESSES, 2–4.

NEW TRIAL. See APPEAL, 12. COSTS, 4. MUNICIPAL CORPORATIONS, 14, 15.

NOTICE.
Of appeal. See APPEAL, 8–10.
Of application for appointment of receiver. See CORPORATIONS, 18.
Of claim for lien. See LIENS, 2, 3.
Of defects in sidewalk. See MUNICIPAL CORPORATIONS, 17, 21.
Of injury. See LIMITATION OF ACTIONS, 2.

NUISANCES.

See MUNICIPAL CORPORATIONS, 27. WATERS.

A complaint to restrain a nuisance alleged facts showing fully irreparable injury, and that the same was continuously and constantly recurring, and that any remedy obtainable in a court of law would

be inadequate. *Held*, that such complaint warrants equitable relief under sec. 3180, Stats. 1898, even though it fails to allege *in hæc verba* any of the conditions prescribed by the statute. *Winchell v. Waukesha*, 101

OPINION evidence. See GUARDIAN AD LITEM, 7. WILLS, 2.

OFFER of judgment. See JUDGMENTS, 1–4.

ORDINANCES. See MUNICIPAL CORPORATIONS, 3–5.

PAROL EVIDENCE. See CONTRACTS, 3–5. DEEDS, 2. RAILROADS, 3.

PARENT AND CHILD. See GUARDIAN AND WARD, 6–8.

PARTIES. See APPEAL, 2–5. EMINENT DOMAIN, 2, 3. INJUNCTION, 3. MORTGAGES, 5.

PARTNERSHIP. See CORPORATIONS, 1–4. LIENS, 9.

PATENTS AND PATENT RIGHTS.

See CONTRACTS, 9.

1. Where a valid patent has been obtained, any improvement which performs the same functions by equivalent means is an infringement. *Tecktonius v. Scott*, 441

2. Where an investigation of a state of the art shows that a given patented invention is of a primary character, and the patentee is a pioneer in the field, a larger latitude is given to the doctrine of equivalents than if the art has been well explored, and a change of form or combination only is involved. *Ibid.*

3. Where a person has a right under a contract to manufacture a patented device, he also has the right to manufacture its legal equivalent. *Ibid.*

4. A judgment of a United States court adjudging that a band fastener manufactured by T. was an infringement of a patent belonging to S., in view of the opinion filed, is *held* to adjudge that T.'s device was an equivalent of that manufactured under S.'s patent. CASSODAY, C. J., and DODGE, J., dissent. *Ibid.*

5. Where, after judgment in such case, S. sells his patent to T., but reserves the right to manufacture his invention, the manufacture by S. of the band fastener formerly manufactured by T. is not a violation of the contract. CASSODAY, C. J., and DODGE, J., dissent. *Ibid.*

PAYMENT. See CONTRACTS, 10. EVIDENCE, 5. GUARDIAN AD LITEM, 1. LIENS, 9. SURETYSHIP, 8. TAX TITLES, 1, 2.

PERSONAL INJURIES. See HIGHWAYS, 4, 5. INSTRUCTIONS TO JURY. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 4–36. MUNICIPAL CORPORATIONS, 15–26. NEGLIGENCE, 3, 5–8. RAILROADS, 7–11. STREET RAILWAYS, 5–19.

PLATS. See RAILROADS, 1, 2.

PLEADING.

See ACTION. CORPORATIONS, 8, 9. COSTS, 5. CRIMINAL LAW, 4, 9, 10. INJUNCTIONS, 4. LIBEL, 1, 2. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 12–14. MORTGAGES, 4. MUNICIPAL CORPORATIONS, 10, 11, 14. NUISANCE. QUIETING TITLE, 2–5. SURETYSHIP, 3.

1. Where no accord and satisfaction is pleaded, the admission of evidence appropriate to the pleadings, but inconsistent with an accord and satisfaction, under such circumstances as to exclude the idea

that it was offered for the purpose of proving new issues, does not justify amendment of pleadings in that respect at the close of the trial. *Mowatt v. Wilkinson*, 176

2. A complaint simply charging negligence states a different cause of action from one charging wilful misconduct or a wanton and reckless act equivalent to wilful misconduct, and evidence of such misconduct is not admissible under the former. *McClellan v. Chippewa Valley E. R. Co.* 326

3. A complaint in foreclosure which sufficiently alleges that impleaded defendants have rights in the mortgaged premises, which plaintiff is entitled to have barred and foreclosed by the judgment and sale thereunder, states facts constituting a cause of action against them, sufficient on demurrer, notwithstanding other relief is demanded to which plaintiff is not entitled. *Citizens L. & T. Co. v. Witte*, 545

4. Prayer for excessive relief does not render a complaint demurrable. *Ibid.*

PLEDGE. See JUDGMENTS, 6.

POLICE POWER. See WATERS.

POWER OF ATTORNEY. See HOMESTEADS, 2. MORTGAGES, 6, 7.

POWERS. See DEEDS, 1. HOMESTEADS, 2. MORTGAGES, 6, 7.

PRACTICE. See APPEAL. CERTIORARI. CONSTITUTIONAL LAW, 11. CORPORATIONS, 13, 14. COSTS. CRIMINAL LAW, 1–10. EMINENT DOMAIN, 4. EXECUTIONS. GUARDIAN AD LITEM, 2–7. INJUNCTION, 4. JUDGMENTS. MASTER AND SERVANT, 33. MORTGAGES, 4, 5. MUNICIPAL CORPORATIONS, 17. PROCESS. RECEIVERS. SURETYSHIP, 3–5. WATERS, 5, 6.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 1, 2. HABEAS CORPUS, 5–7.

PRESUMPTIONS. See APPEAL, 9, 10, 12, 13. CONSTITUTIONAL LAW, 4, 6. CORPORATIONS, 11. ELECTION OF REMEDIES, 4. EXECUTORS AND ADMINISTRATORS, 2. MASTER AND SERVANT, 26. NEGLIGENCE, 4. RAILROADS, 8. RECEIVERS, 5, 8. SALE OF CHATTELS, 2. TAX TITLES, 1.

PRINCIPAL AND AGENT. See CORPORATIONS, 5–7. HOMESTEADS, 2. MASTER AND SERVANT, 31, 32. MORTGAGES, 6, 7. SALE OF CHATTELS, 2, 3, 5–7.

PRINCIPAL AND SURETY. See SURETYSHIP.

PRINTING. See COSTS, 1–3.

PRIVATE ROADS. See HIGHWAYS, 3.

PRIVITY. See CORPORATIONS, 4. INJUNCTIONS, 2.

PROCESS.

See APPEAL, 6. GARNISHMENT.

1. Statutes dispensing with actual personal service of process must be strictly construed. Thus, under subd. 4, sec. 2636, Stats. 1898, authorizing service of the summons on the defendant, if not found, by leaving a copy thereof at his usual place of abode in the presence of some one of his family of suitable age and discretion, who shall be informed of the contents thereof, it is imperative that the summons be delivered to a member of the family to which the defendant belongs. *Heinemann v. Pier*, 185

2. A defendant's married daughter, who resided with her husband in the same house or building with defendant but in separate apartments, the two households being managed separately, each paying its own expenses and employing separate servants, is not a "member" of defendant's family within the meaning of the statute. In order to constitute a *family*, the persons composing it must be under one management or head. *Ibid.*

3. A defendant who has not been personally served with the summons, before the expiration of twenty days after an attempted service, made at the apartment house in which she resided, upon a person not a member of her family, appeared specially in the action and moved to set aside such attempted service. After the entry of judgment by default, she made a second motion to obtain the desired relief, which was denied, and she appealed. *Held*, that she was not guilty of laches. *Ibid.*

4. The defect in the service of the summons in such case being jurisdictional, on a motion to set aside the judgment, the defendant is not required to show merits. *Ibid.*

5. Where there is a conflict of fact to be decided in order to allow the sheriff to amend his return to accord with what he declares to be the fact, there is no forum except the trial court capable of deciding it. *Smith, Thorndike & Brown Co. v. Mutual F. Ins. Co.* 602

PROMISSORY NOTES. See DEEDS, 2. JUDGMENTS, 6. SALE OF CHATTELS, 1, 3. WITNESSES, 2–4.

PROMOTERS. See CORPORATIONS, 5–7.

PROOF of service. See APPEAL, 10. GARNISHMENT, 4, 5.

PROXIMATE CAUSE. See HIGHWAYS, 5. NEGLIGENCE, 3, 5, 7, 8.

PUBLIC POLICY. See CONTRACTS, 9. GAMING CONTRACTS. WATERS, 3.

QUIETING TITLE.

1. In an action to quiet title plaintiff introduced in evidence, as proof of his title to lands in section 17, the record of a deed which described the property as section 19, with a small "7" written over the "9," the original deed not being produced. The "9" was not obliterated nor was there a partial erasure, and there was no deed or other paper in evidence, signed by the grantor in the deed in question, which tended to show that section 17 was intended. *Held*, not sufficient to prove plaintiff's title to land in section 17. *McIntosh v. Marathon L. Co.* 296

2. In an action to remove a cloud on the title to real estate, the complaint alleged that defendant claimed the land under a deed from plaintiff's ancestor, which was invalid because never delivered, and that he had wrongfully obtained possession thereof. On the trial, the court permitted the complaint to be amended so as to allege that the plaintiff's father conveyed the land to her mother under an agreement that the mother was to have only a life estate therein, and that the property was to pass to the plaintiff on her death; that the defendant unduly influenced the mother to execute a deed to him, which was never delivered, but was wrongfully obtained by defendant; and that defendant was in possession under said deed, claiming title to the land. *Held*, not a substantial change in the plaintiff's claim within the meaning of sec. 2830, Stats. 1898, authorizing such amendments. *Post v. Campbell*, 378

3. The substantial change in the "claim," as the term is used in said statute, only stops short of changing one cause of action for another, as the substitution of a cause of action in equity for one at law, or one sounding in tort for one on contract. *Ibid.*

4. In such case an objection to any evidence under the amended complaint, because it failed to state facts constituting a cause of action in equity, was properly overruled, although the complaint showed that plaintiff was out of possession, it being impossible for her to recover without proving, *aliunde* the record, the invalidity of defendant's deed. *Ibid.*

5. In a suit in equity to remove a cloud from the title to the plaintiff's lands, a demurrer *ore tenus*, that the complaint fails to state facts constituting a cause of action in equity, is not sufficient to raise the objection that plaintiff has an adequate remedy at law. Such objection is waived by the failure to enter formal demurrer to the complaint on that specific ground. *Ibid.*

RAILROADS.

See CARRIERS. EMINENT DOMAIN. LIENS, 7, 8. MUNICIPAL CORPORATIONS, 2, 5. STREET RAILWAYS.

Right of way: Dedication: Deeds: Changing grade of street.

1. Plaintiff in platting its lands indicated a street called W. street, and after recording such plat sold lots fronting thereon, many of which, as well as many of those retained, had no access to any other street or alley. Before the recording of such plat plaintiff executed and delivered to a railroad corporation, the predecessor of defendant, a warranty deed granting "the right to construct, build, and operate a railroad . . . upon, over, and along that certain tract, piece, or parcel of land . . . known as W. street . . . according to the plat" of plaintiff, and therein released the railroad corporation from damages occasioned by the "construction, operation, and maintaining a railroad upon said street." In consideration of being allowed to construct its road thereon, the railroad company agreed to grade and prepare W. street for public use, with a space on each side of its tracks for vehicles and for the construction of sidewalks, which was done. *Held*, that the railroad company was not thereby granted the exclusive use of W. street for railroad purposes, and that the deed did not operate as a revocation of an incomplete dedication but granted to the railroad company the right to lay and maintain its tracks upon a strip of land, which was, as between the parties, a street, and which was intended to remain such. *Murray Hill L. Co. v. Milwaukee L., H. & T. Co.* 555

2. Where a land company granted a railroad corporation the right to construct and operate a railroad on a strip of land known as W. street, according to the plat of said land company, the reference in the deed to the plat, in the absence of any indication of intention to abandon or supersede the plat, is not simply for the purposes of description and location, but imports the plat into the deed, and as between the parties to the deed the strip of land is a street. *Ibid.*

3. Where a land company granted a railroad corporation the right to construct and operate its railroad on W. street, words in the deed granting it "all the rights incident to and necessarily and commonly used in connection with the operation of a railroad," at

most introduce an element of uncertainty and ambiguity, rendering admissible parol evidence of the circumstances and situation surrounding the parties at the time of the grant. *Ibid.*

4. Such provision in the conveyance to the railway company in view of the surrounding facts and circumstances is *held* not to control and overrule other clauses granting the mere right to lay and operate tracks upon the grade of an existing street, conforming substantially to the natural surface of the ground, as had theretofore been agreed upon. *Ibid.*

5. Facts showing that said railroad corporation had graded the street in accordance with such agreement, laid its tracks thereon, and occupied and operated them for about four years, present circumstances showing practical location and use, and any indefinite and ambiguous terms of the grant as to place and manner of use become thereby limited and fixed. *Ibid.*

6. The grant being thus construed and made certain, and not being a grant of any right to the railroad corporation to change the grade of W. street, the release of damages contained in such deed is *held* to be a release only of such damages as would arise from the construction and use of the railroad in accordance with the terms of the grant, and not of such as would result from the railroad company changing the grade of the street. *Ibid.*

Injuries to employees: Fellow-servants: Damages.

7. To constitute fellow-servants it is not necessary that the negligent workman causing the injury and the one injured should both be engaged in the same particular work: it is sufficient if they are employed by the same master, under the same control, and performing duties and services for the same general purpose. Hence, a conductor and a brakeman on a freight train, who negligently leave the train standing on the track without displaying the proper signals, are fellow-servants of a fireman on another train, who is injured by a collision resulting from such negligence. *Phillips v. C., M. & St. P. R. Co.* 64 Wis. 475, distinguished. *MacCarthy v. Whitcomb,* 113

8. An action was brought in Wisconsin against a railroad company for an injury occurring in Illinois, caused by the negligence of fellow-servants in the operation of trains. Sec. 1816, Stats. 1898, expressly gives a right of action for all damages sustained within Wisconsin by an employee engaged in the performance of his duty while operating, running, riding upon, or switching passenger, freight, or other trains, engines, or cars, caused by the carelessness or negligence of any other employee. The law of Illinois on the subject of fellow-servants was not proved, but in both states the common law is in force except as modified by statute. *Held*, that the presumption exists that the law of Illinois on that subject is the same as the law in Wisconsin, and that the plaintiff was not barred from a recovery by reason of the negligence complained of being the acts of such fellow-servants. *Ibid.*

9. An action against a railroad company by an employee for injuries received in Illinois, being transitory, is triable in the courts of Wisconsin. *Ibid.*

10. A railroad fireman, injured in a collision, received a compound fracture of a leg, and all the toes of that leg were amputated. He remained in bed ten weeks, was treated for nearly a year and a half, during which time he was very weak, and suffered a great deal, and for a time was helpless. The foot never got thoroughly

well. On the trial of an action therefor, his attorney, in the closing argument, charged that the defendant failed to put certain witnesses on the stand, and that railroad companies had a certain coercive method of calling men in to make statements, and, although warned by the trial court, continued, in substance, that such facts were matter of common knowledge, and that courts take judicial notice that corporations do get men to do those things. *Held*, an abuse of the privilege of counsel. *Ibid.*

11. In view of the record and such remarks of counsel a verdict of $7,500 is *held* greatly excessive, and a remission of $2,500 is made a condition of judgment in plaintiff's favor. *Ibid.*

RATIFICATION. See SALE OF CHATTELS, 3.

REAL PROPERTY. See APPEAL, 13. CORPORATIONS, 5–7. EMINENT DOMAIN. EXECUTORS AND ADMINISTRATORS. FIXTURES. HOMESTEADS. INJUNCTION, 1–3. MORTGAGES. QUIETING TITLE. SPECIFIC PERFORMANCE. WILLS, 5, 6.

RECEIVERS.

Appointment. See CORPORATIONS, 10, 13, 14.

Authority to institute action.

1. A receiver, appointed in supplementary proceedings, is expressly authorized by sec. 3035, Stats. 1898, to bring an action to set aside fraudulent transfers of property, and it is unnecessary to obtain authority therefor from the court. *Wisconsin T. Co. v. Jenkins,* 531

Accounting: Interest.

2. Where a receiver of an insolvent corporation delayed rendering his accounts for many years, and, without justification, paid large sums to attorneys for their services and disbursements under a misunderstanding of his duty, and thereafter diverted a large part of the proceeds intrusted to his care to his own use, the court, in the exercise of its discretion, charged him only with simple interest upon the whole balance due from the time he should have rendered his account. *Speiser v. Merchants' Exch. Bank,* 506

Expenses of receivership: General expenses: Marshaling.

3. It is one of the duties resting on receivers, trustees, and like officers of courts, that they exercise the same diligence to keep down expenses that they use in protecting or realizing upon the property intrusted to them. *Speiser v. Merchants' Exch. Bank,* 506

4. A receiver represents all persons interested in the proceeds to be realized by him. His duty is as high to one as to another, and he must not join as a partisan with one or one class against another. If he does so, without express order of the court, his action will not be approved, nor will he be allowed, as against general funds, expenses thereby incurred. *Ibid.*

5. Where the court has adjudged possession and sale by a receiver, rather than by the less elastic methods permitted the sheriff, advisability and benefit are presumed, and the necessary expense of the taking, care, and disposition of the property, at least, must come out of the proceeds. *Ibid.*

6. When there are different funds in the hands of a receiver, the court should so marshal them as that general expenses will be paid out of general funds, and nothing out of those affected by special rights

or liens except such as pertain directly to the creation or conservation of such special fund. *Ibid.*

7. A receiver, in reliance upon the decisions of the supreme court in the action in which he was appointed, is justified in paying the necessary and reasonable expenses attending the general performance of his duties as an administrative receiver out of funds in his hands, and should be given credit therefor in his accounts. *Ibid.*

Same: Employment of attorneys.

8. While it is possible that the attorneys for one of the antagonistic parties to litigation over assets in the hands of a receiver may be safe advisers for the receiver, the probabilities are all against it. Such practice is a dangerous one and should be discouraged. *Speiser v. Merchants' Exch. Bank,* 506

9. In such case payments to such attorneys should not be approved, or their advice recognized as justification of the receiver's acts, unless it is made entirely clear that the necessarily and properly prejudicial attitude of such counsel cannot have affected their service to the receiver. *Ibid.*

10. Where the financial transactions of a receiver for presentation to the court were of the simplest, and consisted of the receipt, within one month after his appointment, of a gross sum of money, and of a few items of interest thereon, and of some twenty-five items of disbursements, they do not justify the expense of employment of professional assistance in stating the account. *Ibid.*

11. Where, after certain creditors had attached the property of an insolvent corporation, and other creditors had begun proceedings to sequestrate the corporate property, a receiver was appointed in such proceedings, and the prosecution of the attachment suits enjoined, and the sequestration proceedings did not result in the production of any new fund, the receiver is not entitled, without the express order of the court, to credit for expenses and attorney's fees in prosecuting the sequestration proceedings. *Ibid.*

12. Where the property of an insolvent corporation was claimed by general creditors and also under attachment liens, a receiver appointed in sequestration proceedings is not entitled to credit for a voluntary payment of expenditures and attorney's fees incurred in the litigation between the two classes of creditors, in the absence of any showing that he had thereby created a fund for the benefit of a class, all the members of which ought to contribute to the expenses of creating that in which they are to share. *Ibid.*

13. The receiver of a corporation is entitled to credit for expenditures and reasonable attorney's fees in defense of his actual possession of the property confided to him by the court; in taking, arranging, and disposing of such property; in efforts to obtain possession of the books and other assets of the corporation; and in instituting suits on assigned accounts at the express order of the court. *Ibid.*

14. In such case the attorney's fees, taxed as costs and collected, must be deducted from the value of attorney's services, as fixed and allowed by the court. *Ibid.*

Same: Compensation of receiver.

15. The fact that property is in the custody of the law is no justification for violating the principle that, save as costs are taxable by statute, property should not be taken from its owner directly, or indirectly in the form of allowance to a receiver or other trustee, to pay the expenses of his adversary in litigation. *Speiser v. Merchants' Exch. Bank,* 506

16. The compensation of receivers, trustees, and other like officers of courts should be restrained to reasonable charges, measured, not by the highest salaries which large establishments may pay, but by analogy to such as the law allows to public officers having similar duties. *Ibid.*

17. Evidence as to the transactions of a receiver *held* to show such affirmative misconduct as warrants imposing on him as the penalty entire exclusion from any allowance by way of compensation. *Ibid.*

RESCISSION. See SALE OF CHATTELS, 1, 5.

REDEMPTION from tax. See TAX TITLES, 8.

RELEASE.
Of damages. See RAILROADS, 6.
Of surety. See SURETYSHIP, 6.

REMAINDER. See DEEDS, 1. EQUITY. QUIETING TITLE, 2.

REMEDIES. See CERTIORARI. CORPORATIONS, 10–14. ELECTION OF REMEDIES. GARNISHMENT. HABEAS CORPUS. INJUNCTION. MORTGAGES, 1–5. QUIETING TITLE. REPLEVIN. SPECIFIC PERFORMANCE. WATERS, 5, 6.

REPLEVIN.

See EVIDENCE, 1.

1. The plaintiff in an action of replevin testified that his special damages by reason of the wrongful detention of his property was a sum four times the value of the property as found by the court, and well up to the value that by any possibility could have been found upon the proof, and also testified that if he recovered the property it would be worth substantially as much as when new. *Held*, that the court, in assessing damages, might disregard such evidence as incredible. *Bourda v. Jones*, 52

2. In replevin where no special damages are claimed or established by the evidence, the proper rule requires an allowance, as damages, of interest upon the value of the property while the wrongful detention continued; but where the loss in that regard is trifling, the omission of such alowance is not prejudicial error. *Ibid.*

3. In an action of replevin, brought by a nonresident mortgagee to recover possession of machinery sold to defendant and mortgaged to secure the purchase price, the defendant, under subds. 1 and 3, sec. 2656, Stats. 1898, may counterclaim damages for breach of warranty of the goods sold, and also damages in trying to operate machinery returned to the plaintiff and for which the mortgaged property was in part taken in exchange. *Aultman Co. v. McDonough*, 263

4. In an action of replevin where the answer demands judgment for a return of the property described in the complaint and damages for the unlawful seizure thereof, a verdict which finds the value of the property at another time than that at which it was seized in the action, and fails to find that the defendant was entitled to a return thereof and to assess his damages for such wrongful seizure, does not comply with sec. 2859, Stats. 1898, and will not support a judgment, the provisions of sec. 2888 requiring the judgment to be based upon, and to conform to, the verdict. *Ibid.*

RETURN.
On appeal. See APPEAL, 10, 11.
Of process. See CORPORATIONS, 10–12. GARNISHMENT, 3–6. PROCESS.

RES ADJUDICATA. See CORPORATIONS, 4. CRIMINAL LAW, 2. ELECTION OF REMEDIES. GUARDIAN AND WARD, 7. HABEAS CORPUS, 4.

RULES OF COURT.
Supreme Court Rule VIII (Printed case), 281, 285, 667
Supreme Court Rule XXVII (Disrespectful matter in brief), 281, 286
Circuit Court Rule IX (Guardians *ad litem*), 578, 583

RES GESTÆ. See EVIDENCE, 7.

REVOCATION. See RAILROADS, 1.

RIGHT OF WAY. See RAILROADS, 1–6. STREET RAILWAYS, 2–4.

RIPARIAN RIGHTS. See WATERS.

SALE OF CHATTELS.

See FIXTURES. REPLEVIN, 3.

1. Where an engine is sold under a warranty and is found defective, the substitution of another engine in its place, the changing of the contract as to the purchase price, and the giving of additional notes secured by mortgage, do not constitute such a complete rescission of the first contract, so far as the first engine was concerned, as will prevent the recovery of damages for any breaches of warranty as to such engine, and damages for loss of time and expenses in trying to make it do good work, it being expressly agreed that the transaction should not have that effect. *Aultman Co. v. McDonough*, 263
2. Where the agent of the seller, in such a case, employed for the purpose of closing the deal, arranges with the purchaser to substitute a different engine and contract, it will be presumed, in the absence of contrary evidence, that he was authorized to agree to a condition that such change should not defeat the purchaser's claim for damages. *Ibid.*
3. In such case the principal cannot ratify the transaction so far as to retain the new notes, the mortgage securing them, and the first engine, and at the same time repudiate it as to the reservation of the right to such damages. *Ibid.*
4. When an engine is sold under a warranty, and it fails to comply therewith, but the seller requests the purchaser to continue to use and repair it, and promises to pay for the loss of time and repairs, the purchaser may recover special damages for loss of time and expenses in attempting to make the engine work. *Ibid.*
5. In an action to recover the purchase price of a binder sold under a warranty, it appeared, without dispute, that the purchaser returned the machine to the vendor's agent under a claim of rescission of the contract on the ground that it failed to comply with the warranty, but whether such agent accepted the return without protest was in dispute. *Held*, that the question whether the return had been so accepted as to constitute a complete rescission of the contract was material and should have been submitted to the jury. *Warder, Bushnell & Glessner Co. v. Pischer*, 363
6. Where the defendant in such a case claimed a parol modification of the contract by plaintiff's agent, the submission to the jury of the question whether there had been such a modification, under instructions that if they found that a certain conversation, claimed to embody such parol modification, was had, and that it occurred by some clear space of time after the signing of the contract, then they should answer the question in the affirmative, is *held* preju-

dicial to plaintiff. The jury should have been instructed that the question for them to determine was whether the minds of the parties meet, and it was thereby mutually understood that the original contract should be changed in the particulars alleged. *Ibid.*

7. Where plaintiff's agent, authorized to make sale of its machines, sold a binder to defendant, agreeing that he might try it, and if he was not satisfied return it, thereby varying the terms of the written order therefor, such change does not affect the warranty of the machine, and does not go beyond the agent's authority, there being nothing in the written order limiting his authority in that regard. *Ibid.*

SATISFACTION of judgments. See JUDGMENTS, 6. SURETYSHIP, 4.

SEQUESTRATION proceedings. See CORPORATIONS, 10–14. RECEIVERS, 11, 12.

SERVICE.
Of notice of appeal. See APPEAL, 8–10.
Of process. See APPEAL, 6. GARNISHMENT, 3–5. PROCESS.

SETTLEMENT. See APPEAL, 18. DEEDS, 2.

SEWERS. See CONSTITUTIONAL LAW, 4–11. MUNICIPAL CORPORATIONS, 11–13. WATERS.

SHERIFFS. See APPEAL, 4. PROCESS, 5.

SNOW AND ICE. See MUNICIPAL CORPORATIONS, 25, 26.

SPECIAL DAMAGES. See REPLEVIN, 2. SALE OF CHATTELS, 4. WATERS, 2.

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SPECIFIC PERFORMANCE.

In an action for specific performance, a finding that there has been no tender of performance, and that it did not appear that plaintiff was able, ready, or willing to perform the contract if given an opportunity so to do, is sufficient to justify a judgment dismissing the action. *Dickey v. Pugh*, 400

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STREET RAILWAYS.

See EMINENT DOMAIN. LIENS, 7, 8. MUNICIPAL CORPORATIONS, 2, 5. RAILROADS, 1–6.

Franchises.

1. The mere acquirement by purchase of a street-railway franchise containing regulations as to the manner of operating cars, in compliance with a condition of a new and independent franchise which does not refer to the old grant or in any way make its provisions a part of the new one, such condition being clearly imposed to prevent a conflict of rights, does not add to or restrict the provisions of such new grant. *Stafford v. Chippewa Valley E. R. Co.* 331

Right of way: Changing grade of streets: Injunction.

2. A street-railway corporation formed under ch. 86, Stats. 1898, does not possess the powers granted by subd. 5, sec. 1828, Stats. 1898, to commercial railroads organized under ch. 87, to change the course and direction of highways, or carry them over or under its track, hence the powers possessed by the defendant to interfere with the grade of a street must be such as it has acquired by grant. *Murray Hill L. Co. v. Milwaukee L., H. & T. Co.* 555

3. Where a deed to a railroad company was ambiguous, and conferred only a limited right to operate its road in the center of a street, subject to the rights of the public to use it as a public street, and the company, after exercising the rights granted for four years, conveyed its right to a street railway in the same language as was used in the original deed, the grantee, not having inquired as to the facts and circumstances surrounding the original transaction, is not entitled to claim any rights as an innocent purchaser. *Ibid.*

4. Where a street is not within the limits of any city or village, abutting owners are entitled to an injunction restraining a street-railway company from changing the grades thereof, unless such right is acquired by condemnation proceedings under sec. 1863a, Stats. 1898. *Ibid.*

Injuries to persons crossing tracks: Adults: Contributory negligence.

5. It appeared, among other things, that the driver of a wagon, who had plain view for a distance of 300 to 400 feet of an electric car ap-

proaching at a speed of from eight to twelve miles an hour, which was shown to be a usual rate of speed, when within 130 feet of the car, hurriedly attempted to cross in front thereof, and although the motorman immediately attempted to stop the car, a collision occurred. *Held*, that the driver was guilty of contributory negligence as a matter of law. *Watermolen v. Fox River E. R. & P. Co.* 153

6. While travelers on foot, by team, and by electric car may lawfully use the public highway, the purpose of expedition to be accomplished by the electric railway, and the character and weight of the vehicles necessary therefor, must result in deference from the foot traveler and the teamster to the electric car, and in an action to recover for an injury due to a collision the question is not whether the plaintiff had a right to be in the course of defendant's car, but whether he was negligent in being in that position. *Ibid.*

7. Where a motorman approaching a crossing with his car running at a customary speed of from eight to twelve miles an hour sees a driver of a wagon attempt to cross in front of his car when it is within 130 feet of the wagon, and immediately applies the brakes and attempts to stop the car, which is so nearly effected that the car stops from four to ten feet after collision, he is not guilty of gross negligence authorizing a recovery independent of the contributory negligence of the driver. *Ibid.*

8. Plaintiff, driving on a load of hay, turned into a street used by an electric railway, and, while driving on the track, was struck by a car coming up from behind at a speed of from twelve to fifteen miles an hour and injured. *Held*, that if the car was actually in sight when he entered on the track, it was his duty to see it, and that he was guilty of contributory negligence if he did not see it, notwithstanding he testified that he looked and did not see any car. *McClellan v. Chippewa Valley E. R. Co.* 326

9. In such case, if the car was not in sight when he drove upon the track, he was guilty of contributory negligence in traveling 300 feet along the track without looking for the approach of a car. *Ibid.*

10. It being undisputed that a collision between a street car and a wagon, suddenly drawn upon the track in front of such car, at a street crossing, did not result in any injury to the car other than a few scratches of the paint on the front end; that it did not cause any disturbance of the lights upon the car, the persons in charge thereof, or the passengers thereon, other than that caused by sudden application of the brake and reversal of the current; that the car stopped substantially at the place of the collision; and that it did not materially push the wagon ahead upon the track nor mar nor break it at the point of contact, such physical situation is so inconsistent with the theory that the car was going several miles per hour, for the few seconds required for a traveler, approaching the crossing at a speed of three miles per hour, to travel thirty feet, as to leave no ground for the jury to say that the mere speed of the car was so great as to constitute actionable negligence. *Stafford v. Chippewa Valley E. R. Co.* 331

11. Testimony of a person or any number of persons that he or they, when approaching a street-car track with a view of crossing it, looked along the track for a coming car and did not see one, though a car, by reason of physical conditions and distances to be traveled, must have been in plain sight and so near the point of

observation as to render an attempt to cross the track in front of it dangerous, is inconsistent with all reasonable probabilities, and the jury should not be required or allowed to consider the subject as involving a disputed question of fact. *Ibid.*

12. It is the duty of a person, under the foregoing circumstances, in the exercise of ordinary care for his own safety, to see the danger that is perfectly obvious by reasonable attention to the situation, and not to go upon the track in front of the car that is so near that its speed will necessarily have to be greatly slackened or stopped, or collision with the wagon rendered probable; and failure in that regard is contributory negligence as a matter of law. *Ibid.*

13. It is the duty of the traveler upon the street, in approaching a point where he desires to cross a street-car track, to look and listen for a coming car and to perform that duty when and where he will have reasonable opportunity to render his efforts in that regard effective, and it is as much his duty, as a matter of law, to see an approaching car which is in plain sight and in dangerous proximity to the crossing, and not to negligently place himself in the way of it, as it is to look for the car; hence evidence that he performed the duty of looking, but did not see the actually approaching car, does not raise a question of fact. *Ibid.*

14. It is not actionable negligence for the motorman in charge of a street car, when the car is in operation upon a street and approaching a street crossing, to fail to exercise the highest degree of care, or such care as a vigilant or prudent person would exercise under the same or similar circumstances. It is sufficient if he exercises the care of a person of average prudence in the same or similar circumstances. *Ibid.*

15. An instruction that a motorman in charge of a street car, when the car is in operation upon a street and approaching a street crossing, must exercise due care or proper care, unexplained, fails to instruct and may mislead. Coupled with instructions to the effect that the term refers to the highest degree of care, or any degree of care other than that of a person of average prudence under like or similar circumstances, it is error. *Ibid.*

16. A traveler upon a street at a street crossing, desiring to cross the street-car track there situate, has not the same right to require the speed of a car to be slackened to enable him to pass over the track as the person in charge of the cars has to require him to give way to allow the car to pass. *Ibid.*

17. The motorman in charge of a street car approaching a street crossing must use ordinary care for the safety of travelers liable to go into the pathway of the car, but he has the right to expect that such travelers will use ordinary care to inform themselves of the approach of the car and not retard its passage. *Ibid.*

Same: Infants.

18. A motorman on an electric car, when about sixty feet from a street crossing, seeing a five-year-old girl start from the side of the street to cross, immediately sounded his gong and applied the brake. When the child was about twelve feet from the track, she stopped and looked at the approaching car and continued to do so until she reached a point three or four feet from the track, when she stopped, still looking at the car, and thereupon the motorman threw off the brake and allowed the car to drift along. When the car reached a point about six feet from the crossing, the child suddenly started across in front of the car, and was run over and killed. The testi-

mony tended to show that the speed of the car was from eight to sixteen miles per hour, and that the car ran from seventy to eighty feet after it struck the child, notwithstanding the efforts of the motorman to stop it with the brake. *Held*, that no inference of negligence could be drawn from the conduct of the motorman in proceeding to send his car onward past the child, nor from his subsequent conduct; and that the trial court properly directed a verdict for the defendant. CASSODAY, C. J., dissents. *Tishacek v. Milwaukee E. R. & L. Co.* 417

Negligence: Injuries to passengers.

19. Where plaintiff was injured, while boarding a street car, by reason of the sudden starting of the car, an instruction that, to warrant a finding that the injury was caused by a want of ordinary care on the part of the conductor, the jury must find that the accident might reasonably have been expected by the conductor, in the exercise of ordinary care as "a man of intelligence, having the knowledge that may be reasonably expected and ought to have been had" in doing such work, is erroneous, in that it submitted to the jury a false standard of the intelligence and prudence of the man by whose anticipation they might decide the element of probability, and permited them to use as such standard their ideal of what a conductor ought to be, instead of what he customarily is as ascertained by human experience and common knowledge. *Dehsoy v. Milwaukee E. R. & L. Co.* 412

STREETS AND SIDEWALKS. See MUNICIPAL CORPORATIONS, 4, 5, 15-26. NEGLIGENCE, 6. RAILROADS, 1-6. STREET RAILWAYS, 2-19.

SUBCONTRACTORS. See LIENS, 1-3, 8.

SUMMONS. See APPEAL, 6. GARNISHMENT, 3-5. PROCESS, 1-4.

SUPERVENING NEGLIGENCE. See NEGLIGENCE, 1.

SUPPLEMENTARY PROCEEDINGS. See CORPORATIONS, 10-14. RECEIVERS, 1.

SUPREME COURT. See APPEAL. GUARDIAN AND WARD, 8. HABEAS CORPUS, 8.

SURETYSHIP.

See EVIDENCE, 5. GUARDIAN AND WARD, 2, 4, 5. JUDGMENTS, 6. LIENS, 6. WAIVER, 2.

1. Where there were eleven sureties on the bond of a defaulting treasurer, and four of them effected a compromise of a judgment on the bond against all, and settled with the county by paying a less sum than the face of the judgment, they can compel a co-surety who is solvent and within this state to contribute his proportionate share of the amount paid in settlement, although the paying sureties had paid no more than their proportionate share of the original judgment. *Boutin v. Etsell*, 276

2. The recovery in such case may include the proportionate part of reasonable attorney's fees and expenses, prudently incurred by the plaintiffs for the common benefit of all the sureties. *Shepard v. Pebbles*, 38 Wis. 374, distinguished and limited. *Ibid.*

3. In an action at law by sureties to compel contribution by a co-surety, no evidence nor finding as to the insolvency of the principal is necessary. Such fact need neither be averred nor proved. *Ibid.*

4. The fact that the sureties on a defaulting county treasurer's bond settled with the county, and took an assignment instead of a satis-

faction of the judgment, does not prejudice a co-surety sued for contribution, there being no attempt to recover the face of the judgment, but only such sum as the plaintiffs paid to settle the claim. *Ibid.*

5. Where sureties who have paid the judgment and the judgment creditor so agree, the judgment may be kept alive by assignment to the paying sureties, and a co-surety compelled to contribute his proportionate share of the amount actually paid. *Ibid.*

6. Where a bond to secure a contract with a city for the erection and installation of a lighting plant was conditional for the faithful performance of the contract, and the contract provided that, before final payment by the city, the contractor should present receipts in full for all labor performed and materials furnished in the construction and installation of the plant, no action can be maintained on such bond where full payment was made in violation of such express stipulation of the contract. *Electric Appliance Co. v. United States F. & G. Co.* 434

7. A written instrument addressed to plaintiff, which stated that the undersigned agreed to extend an existing guaranty of the credit of a third person for a certain time, to cover sales to be made during such time, is a valid memorandum relating to *future sales*, and sufficiently expresses the consideration within the statute of frauds (sec. 2307, Stats. 1898) requiring a contract to answer for the debt, etc., of another to express the consideration. *Coxe Bros. & Co. v. Milbrath,* 499

8. Where a creditor receives a guaranty only covering credit to be extended to the debtor in the future, and afterwards receives a payment from the debtor without any application thereof by him, the creditor has the right to apply it to the oldest item of the account between them, even though it arose before the guaranty. *Ibid.*

SURVEYS. See HIGHWAYS, 1, 2.

TAXATION. See CONSTITUTIONAL LAW, 1–3, 5, 9–11. MUNICIPAL CORPORATIONS, 1, 2, 6–8, 12, 13. TAX TITLES.

TAX CERTIFICATES. See MORTGAGES, 1, 2.

TAX TITLES.

1. It being the duty of the town treasurer under sec. 1095, Stats. 1898, to note the payment of the taxes upon the tax roll, if paid to him, and the tax roll itself being made presumptive evidence of the facts stated in it under sec. 4162, a tax roll produced and identified by the county clerk, on which appeared opposite the description of the land on which a tax deed had issued, under the column headed "Remarks," the entry "Paid April 15, '64," is sufficient and competent evidence to prove the payment of the tax, and sufficient to defeat the tax deed issued thereon. *McIntosh v. Marathon L. Co.* 296

2. Under sec. 1095, Stats. 1898, it is the duty of the town treasurer to make a duplicate stub receipt whenever he receives payment of any taxes, and by sec. 1096 he is required to compare the stub receipt book with the tax roll, and return it with the tax roll to the county treasurer. Sec. 1096 further provides that such stub receipt book shall have the same effect, as evidence, as the original receipt. *Held*, that a stub receipt book, properly produced and identified, which showed payment of taxes for which a tax deed had been issued, is competent and sufficient evidence of the payment of the

tax and the invalidity of such tax deed. *Pier v. Prouty*, 67 Wis. 218, distinguished. *Ibid.*

3. Where lands were sold for taxes in 1864, and tax deeds issued thereon recorded March 1, 1869, entries in the county clerk's sales book of 1864, opposite the descriptions of such lands, to the effect that they were redeemed June 14, 1869, are incompetent evidence to prove the redemption of such lands from such tax, since they purported to have been made at a time when no officer was empowered to receive redemption money and when no redemption could be made. *Ibid.*

TENDER. See SPECIFIC PERFORMANCE.

TRACTION ENGINE. See HIGHWAYS, 4, 5.

TRANSACTIONS WITH DECEDENTS. See WITNESSES, 1–5.

TRIAL. See APPEAL, 16, 17. EVIDENCE, 1. MASTER AND SERVANT, 16–19, 22, 33. NEGLIGENCE, 5. PLEADING, 1.

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VESTED RIGHTS. See DEEDS, 1,

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WAIVER.

See CORPORATIONS, 3. EVIDENCE, 6. MORTGAGES, 3, 5. MUNICIPAL CORPORATIONS, 9. QUIETING TITLE, 5.

1. Where the service to be performed is continuous, and its proper performance is a condition precedent to a right of action, and the act as performed is defective and imperfect, if the adverse party takes no objection to the manner of its performance, but pays the stipulated price, he cannot afterwards be permitted to reclaim the rights he has thereby waived. *Monroe Water Works Co. v. Monroe*, 11

2. Where a contract with a city for the erection of a lighting plant expressly stipulated that the bond to be given by the contractor for the faithful performance thereof should also be conditioned for the payment by the contractor of all claims for material and labor, the acceptance of a bond without such condition embodied therein is a waiver thereof. *Electric Appliance Co. v. United States F. & G. Co.* 434

WARRANTY. See REPLEVIN, 3. SALE OF CHATTELS.

WATERS.

See INJUNCTION, 1–3.

1. Defendant built a sewer system with an outlet into a navigable river about a quarter of a mile above plaintiff's farm, her house being

850 feet from the river. As the volume of sewage increased defilement of the waters became apparent, and an extremely offensive, disagreeable odor therefrom pervaded plaintiff's residence, causing great distress, discomfort, and illness. The waters of the river were thereby rendered unfit for bathing or for watering stock, and were only about double in volume the amount of sewage flowing into it. The volume of the stream was decreasing and that of the sewage increasing. Experts testified that at an expense of about $5,000 the sewage could be purified and rendered innoxious and inoffensive. *Held*, an obvious nuisance, which, if created and maintained by an individual, would entitle plaintiff to the aid of a court of equity to effect its abatement, and to damages if pecuniary injury was established. *Winchell v. Waukesha*, 101

2. The injuries to plaintiff, in substantial defilement of the waters, preventing their beneficial use and impairing the use of her land itself, are none the less special and private because by the same acts may be created and maintained a public nuisance in defiling the waters of a navigable stream, or in polluting the atmosphere to the detriment of the public health. *Ibid.*

3. How far there must be a yielding of the private rights of continual purity of such lakes and rivers as are the natural and unavoidable courses and receptacles of drainage, to the necessity of use thereof for the public and general health and convenience, and upon what terms such yielding shall come, are primarily questions of policy for the legislature, within the limits of its power over private rights defined by the constitution. *Ibid.*

4. An act of the legislature authorizing a city to construct a sewage system does not give the city, by inference or implication, authority to pollute the waters of a navigable stream and thereby, either from the plan adopted or negligence in management, create a public nuisance to the detriment of the rights of a riparian owner. *Ibid.*

5. In an action by a riparian owner to enjoin a city from emptying its sewage into a navigable stream, where there is no issue of negligence either in construction or management of its sewers, the effect of the remedy by injunction upon the defendant is an important consideration in determining whether the court should apply such relief or leave plaintiff to her legal remedies, and, in that respect, evidence that the sewage could be deodorized and rendered innoxious at small expense is admissible. *Ibid.*

6. Where the trial court found that until December, 1901, would be a reasonable time to allow defendant to change its sewer system, in order to remove any ambiguity in the judgment restraining the defendant, after December, 1901, from continuing to empty its sewage into the river in such condition and manner as to create a nuisance to the plaintiff, it was modified on appeal by adding, "unless the same shall have first been so deodorized and purified as not to contain foul, offensive, or noxious matter capable of injuring the plaintiff or her property or causing nuisance thereto." *Ibid.*

WATERWORKS. See MUNICIPAL CORPORATIONS, 6-10.

WILLS.

Probate. See APPEAL, 2. EVIDENCE, 3.

1. In a contest over the probate of a will findings that the will was not invalid because of the undue influence of the daughter are

held not against the clear preponderance of the evidence. *In re Morgan's Will,* 7

2. Opinions of nonexpert witnesses as to a testator's mental capacity to make a will have little probative force, where the acts and conversations of the testator, on which such opinions are based, show merely mental eccentricities, as distinguished from weakness of mind or delusions affecting testamentary capacity. *In re Butler's Will,* 70

3. The test as to whether a testator has sufficient mental capacity to make a will is not whether he did the best or the wisest or the theoretically just thing in his will, but, whether he had sufficient active memory to collect in his mind and comprehend, without prompting, the condition of his property, his relations to his children and other beneficiaries, and the scope and bearing of his will, and to hold these things in his mind a sufficient length of time to perceive their obvious relations to each other, and be able to form rational judgment in relation thereto. *Ibid.*

4. In a contest over the probate of a will, the evidence — stated in the opinion — is *held* insufficient to show that the testator lacked mental capacity to make the will or that his free agency was destroyed or impaired by the influence of others. *Ibid.*

Foreign. See EXECUTORS AND ADMINISTRATORS.

Enforcement of legacies.

5. In an action to enforce a legacy alleged to be a charge on certain real estate, where the defendant claimed ownership under a parol gift made many years prior to the will, in the absence of any specific finding upon the question of the alleged gift, and the uncertainty as to the proper construction of a finding that the defendant never acquired title except under the terms of such will, the supreme court on appeal will examine the evidence upon the question of the parol gift to ascertain whether the preponderance thereof supports the plaintiff's contention. *Hawkes v. Slight,* 125

6. A testator devised a farm to defendant, his son, charged with a legacy in favor of plaintiff, his daughter, the will being made in 1892. Defendant moved onto the farm in 1876, and had continued in possession for more than twenty years prior to the commencement of the action, making valuable improvements and paying the taxes, except for one year, when they were paid by testator, who took a receipt in his son's name. Defendant claimed title to the farm by parol gift from the testator at the time he moved onto the farm, though such claim was never heard by any member of the testator's family. In 1889 the testator stated to insurance officials, in the presence of the son, and without his denial, that the property was his, and, in an application for insurance on buildings thereon, the son stated that testator's title to the premises was absolute. During the first ten years of defendant's occupancy the testator used wood for his household and lime kiln from the farm, and when defendant sold any he asked permission of testator. Testator's relations with the members of his family were pleasant, no reason appearing why he would disinherit any of his children; but if the devise to defendant, with the charge thereon, was not upheld, the plaintiff would be disinherited, no other provision being made for her, and defendant would receive more than one third of the entire estate, four children and his widow surviving. *Held,* that the facts pointed strongly to and were consistent with an intention on the part of the testator to give the title to the farm to such son by will, and not by the alleged gift. *Ibid.*

WITNESSES.

See APPEAL, 17. EVIDENCE. MASTER AND SERVANT, 16–19, 22, 23, 26, 27, 29. MUNICIPAL CORPORATIONS, 18, 19. WILLS, 2.

1. Sec. 4069, Stats. 1898 (precluding a party from giving testimony in respect to transactions or communications by him personally with a person since deceased), does not extend to questions which call for information merely as to the witness's transactions with a third person, even though it may be argued, from the transactions between the witness and the third person, that certain acts were done by the deceased. *Brader v. Brader*, 423
2. In an action to recover from the executor of plaintiff's husband certain sums, proceeds of property which belonged to her at the time of their marriage, which he afterwards collected and retained, it appeared, without objection, that a note, given for the purchase price of plaintiff's property, was drawn up by a third person in the presence of both herself and her husband. *Held*, that under sec. 4069, Stats. 1898, plaintiff's testimony that the note was given to her husband was inadmissible. *Ibid.*
3. In such case plaintiff testified that a note belonging to her was settled and payment made to her husband in her presence, but that she did not participate in the transaction. *Held*, that the implication of authority given by her presence was a part of the transaction, and that, under sec. 4069, she was disqualified from testifying in respect thereto. *Ibid.*
4. In such case plaintiff, after testifying that at the time of her marriage a certain note, part of her separate property, was in the custody of her daughter, who brought it into the room where plaintiff and her husband were, and that they left the house soon after, was permitted to answer the question whether, after she left the house, she had the note in her actual possession. *Held*, error, since such testimony tended directly to establish a transaction between plaintiff and her husband. *Ibid.*
5. Plaintiff also testified that she received a draft for $250 from her father's estate and kept the proceeds in her possession. Her daughter testified that on one occasion her father asked the plaintiff where she had certain money; that plaintiff replied that it was in her pocket; and that her father thereupon insisted that a more secure place was in his safe, to which her mother responded "Here it is." *Held*, that testimony of plaintiff that she never had that $250, or any of it, after that day, if relevant at all, related to a transaction with the deceased, and was therefore inadmissible. *Ibid.*
6. A witness whose deposition as an adverse party was attempted to be taken under sec. 4096, Stats. 1898, testified that he was not an officer or stockholder of defendant corporation; that he was local manager of its mill at a certain place; that the money used in that mill went through his hands; that he paid employees, looked after outside business, bought material, and conducted the correspondence relating to the mill, but that he had nothing to do with the mechanical running of the mill nor the hiring of help, and that he worked under the direction of the defendant's president, who made weekly visits to the mill. *Held*, that the witness was not the "general managing agent" of defendant, within the meaning of said sec. 4096, nor of sec. 4068, which permits the "general managing agent" of any corporation which is a party, or for whose benefit

the action or proceeding is prosecuted or defended, to be examined on the trial "as if under cross-examination, at the instance of the adverse party." *Kreider v. Wisconsin River P. & P. Co.* 645

7. [Whether an exception to the ruling against the reading of such deposition is available to obviate any error in excluding certain parts thereof, not decided.] *Ibid.*

WORDS AND PHRASES.

All the rights incident to and necessarily and commonly used in connection with the operation of a railroad, in deed. See RAILROADS, 3.

Awaiting further conveyance, in bill of lading. See CARRIERS, 3.

But not exceeding the authorized percentage, in city charter. See MUNICIPAL CORPORATIONS, 13.

Claim, in statute. See QUIETING TITLE, 3.

Current expense, in city charter. See MUNICIPAL CORPORATIONS, 12.

Equivalent, in patent law. See PATENTS, 1.

Family, in insurance policy. See INSURANCE, 4.

General managing agent, in statute. See WITNESSES, 6.

Gross negligence. See NEGLIGENCE, 2.

In process of immediate collection. See CONSTITUTIONAL LAW, 5.

Jurisdiction. See HABEAS CORPUS, 9.

Malicious injury, in statute. See CRIMINAL LAW, 22.

Material facts in relation thereto, in lien statute. See LIENS, 2.

Member of family, in statute. See PROCESS, 2.

Outstanding obligations, in city charter. See MUNICIPAL CORPORATIONS, 12.

Party aggrieved, in appeal statute. See APPEAL, 2–5.

Party in interest. See APPEAL, 5.

Prevent a judgment from which an appeal might be taken, in statute. See APPEAL, 7.

Ready for delivery to the next carrier, in bill of lading. See CARRIERS, 3.

Reasonable fire escape, in statute. See MASTER AND SERVANT, 36.

To sell and convey any real estate, in power of attorney. See MORTGAGES, 6.

Upon cause shown, in statute. See CORPORATIONS, 8.

WRIT:

Of certiorari. See CERTIORARI.

Of error. See APPEAL, 3–5.

Of execution. See CORPORATIONS, 10–12. EXECUTIONS.

Of habeas corpus. See HABEAS CORPUS.

Ex. 1.

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